# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 511.

[redacted] PACKING COMPANY AND PACIFIC AMERICAN FISHERIES, PLAINTIFFS IN ERROR,

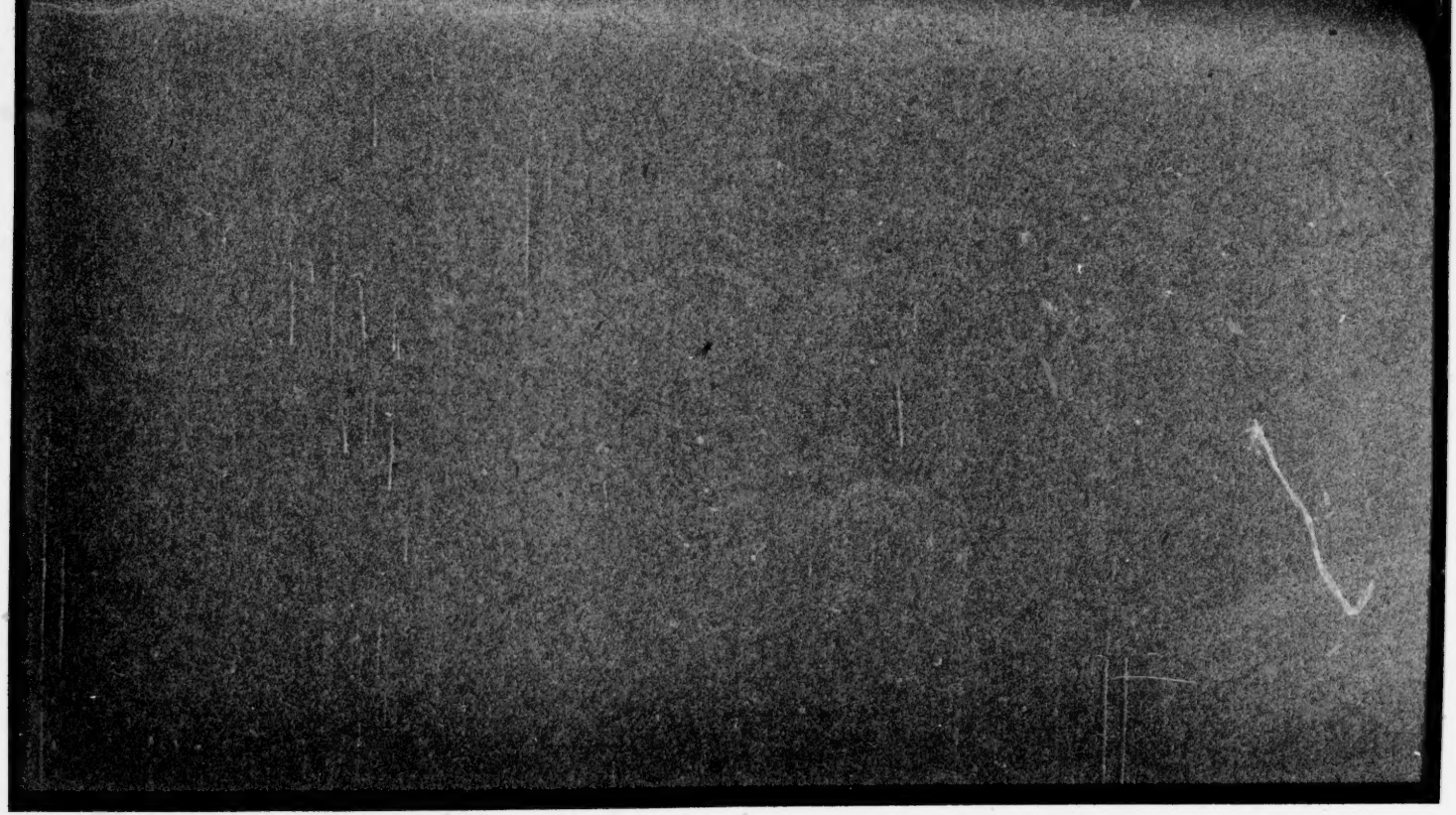
vs.

CARLISLE PACKING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED JANUARY 6, 1913.

(22,003)



(23,002)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1912.

## No. 511.

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E. B. DEMING, DEMING, GOULD COMPANY, AND PACIFIC AMERICAN FISHERIES, PLAINTIFFS IN ERROR,

*vs.*

CARLISLE PACKING COMPANY.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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1 In the Superior Court of the State of Washington in and for the County of Whatcom.

9208.

No. 9418.

*Transcript.*

Filed Oct. 19, 1910. C. S. Reinhart, Clerk.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and Pacific American Fisheries, a Corporation.

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2 In the Superior Court of the State of Washington for Whatcom County.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation.

*Complaint.*

Plaintiff complaining of the defendant says:

1.

That during the times hereinafter set forth plaintiff was and now is a corporation organized and existing under the laws of the state of Washington, and has paid its state license for this current year, and that it is engaged in the business of catching, packing and cur-

ing fish, having its principal place of business at Village Point, Whatcom county, Washington.

2.

That the defendant Deming-Gould Company is a corporation having its place of business in the city of Chicago in the state of Illinois, and the Pacific American Fisheries is a corporation organized under the laws of New Jersey, and E. B. Deming is the managing agent of both of said corporations, who are doing business in Whatcom county, Washington.

3.

That on or about the — day of —— 1907, the defendant E. B. Deming, acting for himself and his co-defendants, entered into a contract with this plaintiff for the purchase of all of the salmon fish packed and to be packed by this plaintiff for the season of 1907.

3

4.

That said agreement was that the said defendants would purchase from this plaintiff, who would sell to said defendants, all of the several grades and varieties of salmon to be packed by plaintiff during the season of 1907, and pay plaintiff for each grade of salmon the opening price thereof, of each grade, kind and size, and make payments as the same were shipped and within ten days from the date of delivery, with an allowance of 1½% for cash discount and 5% brokerage. Deliveries were to be made to some railway terminal point at the expense of this plaintiff, and the said defendants were to furnish shipping instructions on or before January 1st, 1908, or take whatever portion remained unmoved at that time, and pay for the same, warehousing it if necessary and all expenses of such disposition and shipping instructions were to be given to this plaintiff at and before the time for delivery.

5.

That pursuant to said contract this plaintiff delivered to the said defendants all of its pack and the said defendants took said pack and paid for the same except as hereinafter set forth.

6.

That the opening prices and sum which the defendants agreed to pay for such pack were as follows: Sockeye talls $1.65, Sockeye flats $1.80, pink talls 80c, pink flats 90c, pink halves 60c.

7.

That the words "talls" and "flats" have reference to each twelve cans of one pound capacity or a half pound capacity; that each case of salmon contained four dozen cans, or forty-eight cans in all, of one pound capacity.

4 8.

That amongst others of the pack sold to the defendants by said plaintiff were 10,903 pink flats and the opening value and price of which was 90c per dozen, or $3.60 per case, and at the direction and upon the instruction of the said defendants said salmon were delivered between the 4th day of October, 1907, and January 1st, 1908, and the price so agreed to be paid became due and payable to plaintiff.

9.

That said defendants, disregarding their contract aforesaid, after the receipt of the property as aforesaid, refused to pay this plaintiff for the said 10,903 cases of pink flats and abandoned the said property to this plaintiff after making it subject to charges for warehousing and insurance placed by the said defendants, and this plaintiff, in order to save itself, was required to take said salmon and to sell the same upon a depreciated market and at a less price than the defendants had agreed to pay, and was required to pay the insurance and warehouse charges incurred against said property.

10.

That said property was sold to said defendants at the sum of $36786.20 and plaintiff was required to retake and sell the same for a total sum of $30001.75, whereby it lost $6784.45 on said salmon, and it lost on account of moneys paid out, storage and insurance $1706.84 and on commissions the sum of $1530.68, and it was deprived of the use of its money and was required to pay interest on account thereof amounting to $2146.16.

11.

5 That during the time aforesaid, and of the property which the said defendants kept and paid for, the said defendants failed to make payments within the time provided and agreed for in their contract as follows:

Upon the payment made October 19, 1907, there was 39c interest accrued.

On the payment made November 1st, there was due $14.21 interest accrued.

On the payment made November 7th, there was due $13.05 interest accrued.

On the payment made November 11th there was due $3.27 interest accrued.

On the payment made November 14th, there was due $1.32 interest accrued.

On the payment made November 23rd there was due $4.38 interest accrued.

On the payment made November 25th, there was due $1.38 interest accrued.

On the payment made December 6th, there was due $1.58 interest accrued.

On the payment made December 16th, there was due $14.56 interest accrued.

On the payment made December 20th, there was due $98.43 interest accrued.

On the payment made December 29th, there was due $12.19 interest accrued.

On the payment made January 18th, 1908, there was due $5.53 interest accrued.

On the payment made February 5th, 1908, there was due accumulated interest unpaid of $212.98, $74.23, $82.67, $67.93, $6.46, $128.98, $24.76, 42c, 1c, 32c, making a total of interest unpaid on the moneys withheld of $786.91, which money in amount this plaintiff was compelled to pay and lose.

12.

6 That because of the acts and doings of the said defendants and their failure to keep and perform their contract as aforesaid this plaintiff has suffered loss and damage in the sum of $12,955.04, with interest thereon since January 1st, 1908.

Wherefore this plaintiff prays judgment against the defendants and each of them for the sum of $12,955.04 together with interest on said sum from the 1st day of January, 1908, and its costs.

FAIRCHILD & BRUCE,
*Attorneys for Plaintiff.*

STATE OF WASHINGTON,
*County of Whatcom*, ss:

Frank Wright being first duly sworn on oath deposes and says that he is the president and manager of the plaintiff herein and makes this affidavit for and in its behalf; that he has read the foregoing complaint, knows the contents thereof and the allegations therein contained are true.

FRANK WRIGHT.

Subscribed and sworn to before me this 2 day of December, 1909.

S. M. BRUCE,
*Notary Public, Residing at Bellingham.*

Filed Dec. 2, 1909. R. J. Glen, Clerk.

7 In the Superior Court of the State of Washington for Whatcom County.

No. —.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,

vs.

E. B. DEMING; DEMING GOULD COMPANY, a Corporation, and the PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Answer.*

Come now the defendants above named and answering the complaint of the plaintiff on file herein for cause of answer say:

I.

They admit the allegations contained in paragraphs one and two of said complaint.

II.

Answering the third paragraph of said complaint defendant denies the same and each and every part thereof.

III.

Answering the fourth paragraph of said complaint the defendants deny the same and each and every part thereof.

IV.

Answering the fifth paragraph of said complaint the defendants deny the same and each any every part thereof.

V.

Answering the sixth paragraph of said complaint, the defendants deny the same and each and every part thereof.

VI.

Answering the seventh paragraph of said complaint, the defendants deny the same and each and every part thereof.

VII.

Answering the eighth paragraph of said complaint the defendants deny the same and each and every part thereof.

8 VIII.

Answering the ninth paragraph of said complaint, the defendants deny the same and each and every part thereof.

IX.

Answering the tenth paragraph of said complaint, the defendants deny the same and each and every part thereof.

X.

Answering the eleventh paragraph of said complaint the defendants deny the same and each and every part thereof.

XI.

Answering the twelfth paragraph of said complaint, these defendants deny the same and each and every part thereof and deny the plaintiff has suffered damage in the sum of $12,955.04 or any part thereof.

Wherefore having fully answered the defendants pray to be dismissed hence and for judgment against the plaintiff for their costs and disbursements herein incurred.

KERR & McCORD,
*Attorneys for Defendants.*

Filed Apr. 29, 1910, R. J. Glen, Clerk, by S. E. Leitch, Deputy Clerk.

9 STATE OF WASHINGTON,
*County of King,* ss:

E. S. McCord, being first duly sworn, on oath says: That he is one of the attorneys for the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true that he makes this verification for and on behalf of the defendants for the reason that the defendants and all thereof are absent from the county of King, state of Washington wherein affiant resides.

E. S. McCORD.

Subscribed and sworn to before me this — day of March, 1910.

——— ———.

10 In the Superior Court of the State of Washington in and for Whatcom County.

# 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff.
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Order.*

Plaintiff appearing by its attorneys, Fairchild & Bruce and C. W. Dorr, and defendants appearing by their attorneys, Kerr & McCord, and defendant E. B. Deming appearing in person, the trial of this cause is now resumed pursuant to adjournment and the hearing of testimony on behalf of the defendants is concluded and the defense rested at 11:09 o'clock a. m. Rebuttal testimony is heard on behalf of the plaintiff and both sides rested at 11:40 o'clock a. m.

Thereupon, the jury is sent to the jury room and the defendants file a petition for removal of this cause to the United States circuit court for the western district of Washington, Northern Division, an affidavit for removal and bond on removal, and move the court for an order of removal to said United States circuit court, which motion is by the court denied, with an exception to defendants. Defendants E. B. Deming and Pacific American Fisheries thereupon move the court separately for a dismissal as to said defendants, and defendant Deming-Gould Company moves for an in-

structed verdict, which said motions separately made are each by the court denied, with exceptions to the defendants.

The jury is recalled and is instructed by the court, arguments of counsel are made to the jury and the jury retires to the jury room in charge of a sworn bailiff at 5:25 p. m. there to deliberate of a verdict, it being agreed in open court by counsel for the plaintiff and for the defendants that a sealed verdict may be returned if reached by the jury during the night.

Dated May 4, 1910.

ED. E. HARDIN, *Judge.*

11 In the Superior Court of the State of Washington in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Verdict.*

We, the jury in the above entitled cause, duly empaneled and sworn, do find for the plaintiff and against the defendants, and assess the plaintiff's damages in the sum of $12700.00.

HENRY LARSON, *Foreman.*

Filed May 5, 1910. R. J. Glen, Clerk, by S. E. Leitch, deputy. Ex. H. 115-A2-463.

12 In the Superior Court of the State of Washington in and for Whatcom County.

# 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Judgment on Verdict.*

Plaintiff appearing by its attorneys, Fairchild & Bruce, and C. W. Dorr, and defendants being represented by their attorneys, Kerr & McCord, now on this 5th day of May, 1910, at the incoming of court, the jury in the above entitled cause return into court with a sealed verdict finding for the plaintiff and against the defendants, which verdict is in words and figures as follows, to-wit:

"In the Superior Court of the State of Washington in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Verdict.*

We, the jury in the above entitled cause, duly empaneled and sworn, do find for the plaintiff and against the defendants, and assess the plaintiff's damages in the sum of $12,700.00.

HENRY LARSON, *Foreman.*"

The jury is polled on request of the defendants and each of the jurors answers in support of the verdict as his name is called. The verdict is filed in the presence of the jury and the jury is excused.

Wherefore, by reason of the law and the premises, it is now ordered and adjudged that the plaintiff, Carlisle Packing Company, a corporation, do have and recover of and from E. B. Deming, Deming-Gould Company, a corporation, and Pacific American
13 Fisheries, a corporation, and each of them, the sum of twelve thousand seven hundred dollars, ($12,700.00), together with plaintiff's costs herein laid out and expended and to be taxed as by law provided.

Dated May 5, 1910.

ED. E. HARDIN, *Judge.*

Journal A 2, Page 463.

14 In the Superior Court of Whatcom County, State of Washington.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Motion for New Trial.*

Come now the defendants above-named, and move the court to vacate and set aside the verdict rendered in the above-entitled cause in favor of the plaintiff and against the defendants, and move the court for an order granting a new trial to the defendants in the above-entitled cause, upon the following grounds and for the following reasons materially affecting the substantial rights of the defendants and each of them.

First. Irregularity in the proceedings of the court, jury and plaintiff.

Second. Accident or surprise, which ordinary prudence could not have guarded against.

Third. Excessive damages, appearing to have been given under the influence of passion or prejudice.

Fourth. Error in the assessment of the amount of recovery the same being too large.

Fifth. Insufficiency of the evidence to justify the verdict, and that it is against law.

Sixth. Errors in law occurring at the trial and excepted to at the time by the defendants.

KERR & McCORD,
*Attorneys for Defendants.*

15 STATE OF WASHINGTON,
*County of King, ss:*

E. S. McCord being first duly sworn, deposes and says: That he is a member of the firm of Kerr & McCord, attorneys for the defendants in the above entitled action; that he has read the within and foregoing motion, and that the same is meritorious and well founded in law.

E. S. McCORD.

Subscribed and sworn to before me this the 6th day of May, 1910.

S. H. KERR,
*Notary Public in and for the State of Washington, Residing at Seattle.*

Filed May 6, 1910. R. J. Glen, Clerk, by V. A. Minton, Deputy Clerk.

Copy of within motion received and due service of same acknowledged this 6th day of May, A. D. 1910.

____ ____,
*Attorneys for Plaintiff.*

16 In the Superior Court of the State of Washington for Whatcom County.

# 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING and DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Order.*

Come again the parties *in* this action coming on to be heard upon the defendants' motion herein for a new trial, and the court having

heard the motion and being fully advised in the premises, now overrules the same, to which ruling the defendants and each of them severally except, and exception is noted.

It is therefore ordered, adjudged and decreed that the plaintiff be and it is hereby awarded judgment on the verdict as entered by the clerk for the sum of twelve thousand seven hundred ($12,700.00) dollars, with interest from the date of the filing of said verdict to wit: with interest from the 4th day of May, 1910, computed at 6% per annum, together with costs accrued, all of which is finally considered, ordered and adjudged.

Dated this 13th day of June, 1910.

ED. E. HARDIN, *Judge.*

Filed Jun- 13, 1910. R. J. Glen, Clerk, by S. E. Leitch, Deputy Clerk. A2-483.

17 In the Superior Court of Whatcom County, State of Washington.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Notice.*

STATE OF WASHINGTON,
*County of Whatcom, ss:*

To Carlisle Packing Company, a corporation, and to S. M. Bruce and Dorr & Hadley, its attorneys:

Notice is hereby given that the defendants, E. B. Deming, Deming-Gould Company, a corporation, and Pacific American Fisheries, a corporation, have appealed and do hereby appeal to the supreme court of the State of Washington from that certain judgment entered in the above entitled cause on the 13th day of June, A. D. 1910, in favor of the plaintiff and against the defendants for the sum of $12700, together with plaintiff's costs, and from the whole of said judgment and from each and every part thereof.

KERR & McCORD,
*Attorneys for Defendants.*

Filed Jul- 1, 1910. R. J. Glen, Clerk. A2-497.

Copy of within notice of appeal received and due service of same acknowledged this 1 day of July, A. D. 1910.

FAIRCHILD & BRUCE,
DORR & HADLEY,
*Attorneys for Plaintiff.*

18 In the Superior Court of Whatcom County, State of Washington.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Appeal Bond.*

Whereas, on the 13th day of June, A. D. 1910, a judgment was entered in the above entitled cause, in favor of the plaintiff and against the defendants, and the defendants have appealed to the supreme court of the state of Washington from said judgment and the whole thereof, and in order to perfect said appeal are required to furnish a bond in the sum required by law;

Now, therefore, know all men by these presents, that E. B. Deming, Deming-Gould Company and Pacific American Fisheries as principals, and D. M. Brosseau and R. A. Welch as sureties, are held and firmly bound unto the plaintiff, the Carlisle Packing Company in the sum of two hundred dollars ($200) for the payment of which well and truly to be made they bind themselves, their heirs, executors, administrators and assigns firmly, jointly and severally by these presents.

Sealed with their seals and dated this 1st day of July, A. D. 1910.

The condition of the above obligation is such that if the above named principals shall pay all costs and damages that may be awarded against them and each of them on said appeal or on the dismissal thereof, not exceeding the sum of two hundred dol-
19 lars ($200) then this obligation to be void; otherwise to remain in full force and effect.

E. B. DEMING,
DEMING-GOULD COMPANY, A CORPORATION,
[SEAL.] By E. B. DEMING, *Vice President.*
PACIFIC AMERICAN FISHERIES, A CORPORATION,
By E. B. DEMING, *President.*
[SEAL.] D. M. BROSSEAU.
R. A. WELSH.

STATE OF WASHINGTON,
*County of Whatcom,* ss:

D. M. Brosseau and R. A. Welch being first duly sworn, each on his oath deposes and says:

That he is one of the parties who executed the foregoing bond as surety; that he is worth the sum of four hundred dollars, over and above all his just debts and liabilities, in statutory separate property

situated in Whatcom county, state of Washington, not by law exempt from sale on execution; that he is not an attorney nor counselor at law, clerk of the superior court, county clerk or other city, county or state officer.

D. M. BROSSEAU.
R. A. WELSH.

Subscribed and sworn to before me this the 1 day of July, A. D. 1910.

THAD. McGLINN,
*Notary Public in and for the State of Washington, Residing at Bellingham.*

Filed Jul- 1, 1909. R. J. Glen, Clerk.

A 2-497.

20 In the Superior Court of the State of Washington in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Petition for Removal to the United States Circuit Court for the Western District of Washington.*

To the Honorable Superior Court of the State of Washington in and for the County of Whatcom:

Your petitioners, Deming-Gould Company, a corporation, and Pacific American Fisheries, a corporation, respectfully show to this honorable court that the matter and amount in dispute in the above entitled suit exceeds, exclusive of interest and costs, the sum and value of two thousand ($2,000.00) dollars.

**2.**

That the controversy in said suit is between citizens of different states, and that your petitioner Deming-Gould Company, in the above entitled suit, was at the time of the commencement of this action, and now is, a citizen and resident of the city of Chicago, county of Cook and state of Illinois, and is a corporation organized and existing under and by virtue of the laws of the state of Illinois, and is a non resident of the state of Washington; and that your petitioner, Pacific American Fisheries, in the above entitled suit, was at the time of the commencement of this suit and still is, a resident of and citizen of the state of Maine, and is a corporation organized and existing under the laws of the state of Maine, and is a non resident of the

state of Washington, and that the plaintiff, Carlisle Packing Company, a corporation, was at the time of the commencement of this action, and still is, a corporation organized and existing under and by virtue of the laws of the state of Washington, and is a resident and citizen of the state of Washington.

21

3.

That at the time of the commencement of this action the defendant, E. B. Deming, was, and still is, a resident and citizen of the state of Washington; that the said E. B. Deming was made a party defendant to the above entitled action by the plaintiff above named fraudulently and improperly, and wrongfully for the sole and only purpose of depriving the United States Circuit court for the western District of Washington of jurisdiction over the subject matter in controversy in this action, and for the purpose of depriving the said United States Circuit Court for the Western District of Washington of jurisdiction of the defendants in this action, and for the sole and only purpose of preventing the defendants, Deming-Gould Company and Pacific American Fisheries, from removing this cause and suit from the superior court of the state of Washington for Whatcom county to said United States circuit court for the western district of Washington; that the said E. B. Deming was not, and is not, a proper party to said action, and was not at the time of the commencement of this action, and is not now a proper party defendants; that upon the face of the complaint and upon the face of the record at the time of the commencement of the trial of this action no ground for removal from the state court to the federal court appeared; that the testimony on behalf of the plaintiff has now been introduced in said action and testimony on the part of the defendants, and that the plaintiff has rested its case, and that from the evidence introduced in the trial of said cause it has been demonstrated beyond doubt that the defendant, E. B. Deming, was not in any wise connected with the controversy in this action, and that it appears from said testimony that no contract was ever made by the plaintiff and the defendant, E. B. Deming, as set forth in the complaint, and that the said E. B. Deming, in making the alleged contract set forth in the com-

22 plaint was acting solely as an officer and representative of said Deming-Gould Company; and that whatever contract was made by the plaintiff was made with Deming-Gould Company relative to the subject matter of said action; that at the time the plaintiff finally rested its case it manifestly appeared that the defendant E. B. Deming, had been improperly made a party to said suit, and for the purpose of holding and confining said action to this court and to deprive the federal court of jurisdiction of the subject matter and the parties to this action; that now, at the conclusion of the testimony in this case, the status of the case now discloses for the first time the right of the defendants, Deming-Gould Company and Pacific American Fisheries, to remove said action to the federal court on the ground of a diversity of citizenship, and by reason of the fact that the defendant E. B. Deming was improperly and wrongfully made a party defendant to said action; that by reason of plaintiff's improp-

erly including the said defendant, E. B. Deming, as a party defendant in this action, your petitioners were deprived of the right and privilege of removing said action to the United States circuit court for the western district of Washington, and upon the record as it now stands and upon the testimony introduced in this cause, and upon the affidavit of E. B. Deming filed herein, your petitioners now present this petition and ask for the removal of this cause to the United States circuit court for the western district of Washington; this being the first and only opportunity that your petitioners have had to ask for this removal, and that since the plaintiff has finally rested its case no steps of any nature or kind whatsoever have been taken in said cause by your petitioners.

**4.**

And your petitioners further offer herewith a good and sufficient bond with a *bood* and sufficient surety for their entering in
23 the United States circuit court for the western district of Washington on the first day of next session thereof a copy of the record in this suit and paying of costs that may be awarded by said United States circuit court for the western district of Washington if said United States district court for the western district of Washington shall hold that this suit was wrongfully or improperly removed thereto, and your petitioners pray this honorable court to proceed no further herein except to make the order of removal required by law, and accept the said surety and bond, and cause the record herein to be removed to said United States circuit court for the western district of Washington;

And your petitioners will ever pray.

PACIFIC AMERICAN FISHERIES,
By E. B. DEMING, *Its President.*
DEMING-GOULD COMPANY,
By E. B. DEMING, *Its Vice-President.*

KERR & McCORD,
*Attorneys for Petitioners.*

STATE OF WASHINGTON,
*County of Whatcom,* ss:

E. B. Deming, being first duly sworn, deposes and says: That I am the president of the Pacific American Fisheries, one of the petitioners above named, a corporation organized and existing under and by virtue of the — state of Maine, and a resident and citizen of the state of Maine, and that I am the vice-president of Deming-Gould Company, a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and a resident and citizen of the state of Illinois; that the foregoing petition is true of
24 my own knowledge except in those matters therein stated and alleged on information and belief, and as to those matters I believe it to be true and that I make this affidavit for and on behalf of these petitioners and as the duly authorized president of the Pacific American Fisheries and as the duly authorized vice-president of Deming-Gould Company.

E. B. DEMING.

Subscribed and sworn to before me this 4th day of May, 1910.

E. S. McCORD,
*Notary Public in and for the State of Washington.*

STATE OF WASHINGTON,
*County of Whatcom, ss:*

On this 4th day of May, 1910, before me, a notary public in and for the state of Washington, personally appeared E. B. Deming, known to me to be the individual who executed the foregoing petition, for and on behalf of Deming-Gould Company, one of the petitioners, and as the vice-president of Deming-Gould Company, and acknowledged to me that he executed the same freely, voluntarily and for the uses and purposes therein mentioned, and as the vice-president of said Deming-Gould Company, and that he was fully authorized to execute said petition, and that said E. B. Deming who executed said petition on behalf of the Pacific American Fisheries, as its president, acknowledged to me that he executed the same freely, voluntarily and for the uses and purposes therein mentioned, and as the free and voluntary act of said Pacific American Fisheries, and that he was duly authorized to execute said petition on behalf of Deming-Gould Company and on behalf of Pacific American Fisheries.

Witness my hand and official seal, the day and year in this
25 certificate above written.

E. S. McCORD,
*Notary Public in and for the State of Washington, Residing at Seattle.*

Filed May 4, 1910. R. J. Glen, Clerk, By S. E. Leitch, Deputy.

26 In the Superior Court of the State of Washington, in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Bond on Removal to the United States Circuit Court for the Western District of Washington.*

Know all men by these presents: that Deming-Gould Company, of Chicago, Illinois, and Pacific American Fisheries of the state of Maine, as principals, and A. W. Deming as surety, are held and firmly bound unto the Carlisle Packing Company, a corporation, in the penal sum of one thousand ($1,000.00) dollars, for the payment whereof well and truly to be made unto the said Carlisle Packing Company, its successors and assigns, bind themselves, their

executors, administrators, successors and assigns, jointly and severally firmly by these presents.

Upon the condition, nevertheless, that, whereas the said Deming-Gould Company and said Pacific American Fisheries have petitioned the superior court of the state of Washington in and for the county of Whatcom, for the removal of a certain cause therein pending wherein the said Carlisle Packing Company is plaintiff, and the said Deming-Gould Company and the said Pacific American Fisheries were two of the defendants, to the United States Circuit Court for the Western District of Washington;

Now, therefore, if the said Deming-Gould Company and Pacific American Fisheries shall enter in the said United States Circuit Court for the Western District of Washington on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said United States Circuit Court for the Western District of Washington, if the said court shall hold the said suit was wrongfully or improperly
27 removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof the said Deming-Gould Company, by its vice-president, thereunto duly authorized, has caused these presents to be executed and the said Pacific American Fisheries, by its president, thereunto duly authorized, has caused these presents to be executed, and the said A. W. Deming has hereunto set his hand and seal this, the 4th day of May, A. D. 1910.

DEMING-GOULD COMPANY,
By E. B. DEMING,
*Its Vice-President.*
PACIFIC AMERICAN FISHERIES,
By E. B. DEMING,
*Its President.*
A. W. DEMING, [SEAL.]
*Surety.*

STATE OF WASHINGTON,
*County of Whatcom*, ss:

A. W. Deming, being first duly sworn on oath deposes and says: I reside in the city of Bellingham, Whatcom county, Washington, and am a freeholder therein, and am worth the sum of two thousand ($2,000.00) dollars over and above all my just debts and liabilities in property not by law exempt from sale on execution and in statutory separate property situated in the state of Washington and in the county of Whatcom; that I am not an attorney or counselor at law, clerk of the superior court nor other state, county or city official.

A. W. DEMING.

Subscribed and sworn to before me this 4th day of May, A. D. 1910.

E. S. McCORD,
*Notary Public in and for the State of Washington.*

28 STATE OF WASHINGTON,
*County of Whatcom, ss:*

On this the 4th day of May, A. D. 1910, in the county of Whatcom and state of Washington, before me, a notary public in and for said county of Whatcom and state of Washington, personally appeared the above named A. W. Deming, surety, of Whatcom county, state of Washington, to me known to be the individual described in and who executed the foregoing instrument as surety thereon, and who then and there acknowledged to me that he had executed the foregoing bond as surety, and E. B. Deming, vice-president of Deming-Gould Company, one of the principals who executed the foregoing bond on behalf of said Deming-Gould Company, and that he had full power and authority to execute the same, and said E. B. Deming, president of Pacific American Fisheries, one of the principals who executed the foregoing bond, acknowledged to me that he executed the foregoing bond on behalf of said Pacific American Fisheries, and that he had full power and authority to execute the same.

Witness my hand and official seal the day and year in this certificate above written.

E. S. McCORD,
*Notary Public in and for the County of Whatcom, State of Washington.*

Filed May 4, 1910. R. J. Glen, Clerk. By S. E. Leitch, Deputy. A 2-461.

29 In the Superior Court of the State of Washington for Whatcom County.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Instructions Requested by Defendants.*

Statement.

The plaintiff contends that in the months of February or March, 1907, the defendants entered into a contract with the plaintiff for the purchase of all of the salmon fish packed and to be packed by the plaintiff in the season of 1907, and that said agreement was that the said defendants would purchase from the plaintiff, who would sell to the said defendants, all of the several grades and varieties of salmon to be packed by plaintiff during the season of 1907, and pay plaintiff for each grade of salmon the opening price thereof of each grade, kind and size, and make payment as the same were shipped and

within ten days from the date of delivery, with an allowance of one and one-half per cent for cash discount, and five per cent brokerage; that delivery should be made to some railway point at the expense of the plaintiff, and that defendants were to furnish shipping instructions on or before February 1, 1908, or take whatever portion remained unmoved at that time and pay for the same, warehousing it, if necessary, and all expenses of such disposition and shipping instructions were to be given to the plaintiff at and before the time for delivery; that pursuant to said contract, the plaintiff delivered to the defendants all of its pack and that the said defendants took said pack and paid for all of the sockeye salmon and all of the pink talls salmon at the contract price.

That the opening prices and those which the defendants
30 agreed to pay for said pack were as follows:

| | |
|---|---|
| Sockeye talls | $1.65 |
| Sockeye flats | 1.80 |
| Pink talls | .80 |
| Pink flats | .90 |
| Pink halves | .60 |

That among said pack sold to defendants by the said plaintiff, were 10,903 pink flats, and the opening value and prices of which was 90 cents per dozen, or $3.60 per case; and that the said salmon was delivered between the 4th of October, 1907, and January 1, 1908.

That the defendants without cause, refused to accept the said salmon, and that the plaintiff was compelled to take over the same and did retain the said salmon.

The defendants contend that no such contract was made relating to the sale and purchase of said salmon, but contend that at or about the time specified in the months of March or April, 1907, the defendant, Deming-Gould Company, then engaged in the salmon produce business, entered into an agreement with the plaintiff by the terms of which defendant, Deming-Gould Company, agreed to handle as brokers the entire salmon pack of the plaintiff for the year 1907, including all grades and varieties, for the handling of which the plaintiff agreed to pay to the defendant, Deming-Gould Company, the customary commission of 5% and 1½% discount;

That as a part of said agreement, it was also agreed between the Deming-Gould Company, and the plaintiff, that the defendant, Deming-Gould Company, would pro rate the orders they received for salmon between the plaintiff and its other customers, and would give shipping instructions from time to time as such orders were received by Deming-Gould Company, and it was further agreed that if all of the salmon of plaintiff had not been sold through the agency of Deming-Gould Company on or before February 1, 1908, that Deming-Gould Company would take over the unsold portion of the pack at the market price at said time, if the plaintiff was will-
31 ing that it should do so, but it was optional with the plaintiff on February 1, 1908, whether the plaintiff would accept the

market price for the unsold goods, but that in any event the goods so unsold should be sold only through the brokerage firm of Deming-Gould Company;

That it was not compulsory upon the plaintiff to sell the remaining salmon on February 1, 1908, at the said market value, but it was compulsory upon the defendant Deming-Gould Company to take said salmon at such prices at said date if requested so to do by the plaintiff.

There is therefore a clear issue between the parties to this controversy; the plaintiff contending on the one hand that the salmon remaining unsold on February 1, 1908, was to be taken by the defendant at the opening price of salmon for the pack of 1907; defendants contending that Deming-Gould Company was to take such salmon if requested by the plaintiff on February 1, 1908, at the then market price, less the usual discount and brokerage as hereinbefore stated, aggregating 6½%.

This is the main controversy in this action. There is, however, an additional question involved. The plaintiff contends that all salmon delivered by the plaintiff to the defendant, Deming-Gould Company, prior to February 1, 1908, should be paid for within ten — after the date of delivery, and if not so paid within said time, then the same was to draw interest at the rate of six per cent. per annum for all time in excess of ten days between the date of delivery of the salmon, and the date of payment. The defendants deny that any such agreement either as to time of payment, or as to interest, after the expiration of ten days after the date of the several deliveries.

Having thus outlined to you, the issues involved in this case, I will now proceed to give to you instructions defining the law applicable to the facts in controversy in this action.

32 Instruction I.

The plaintiff contends that the defendants agreed to purchase from it 10,903 cases of pink flats salmon at $3.60 a case, and that the total amount that the plaintiff agreed to pay for said salmon after allowing 1½% discount and 5% brokerage, aggregated the total sum of $36,786.20, and the plaintiff admits in its pleadings that it realized from the sale of salmon which the defendants did not take, the sum of $30,001.75, and that the difference between the amount received by the plaintiff from the sale of such untaken salmon and the contract price for the same was the sum of $6,784.45; and if you find from the evidence in this case that the defendants agreed to purchase the salmon in question, and to pay the opening price for the same, then I instruct you that the plaintiff cannot in any event recover in this action anything in excess of the said sum of $6,784.45.

This sum is the limit of plaintiff's recovery in this action, in any event, except as to the item of interest about which I shall hereafter instruct you.

33 Instruction II.

If you find from the evidence in this case that the salmon in question was not delivered to the defendants by the plaintiffs, but remained in the possession and under the control of plaintiff at all times, both prior and subsequent to February 1, 1908, then I instruct you that it was the duty of the plaintiff, in case you find that the defendants breached their contract, to sell the salmon so remaining in its hands at the market value and price thereof at the place of delivery within a reasonable time thereafter, and that it was the duty of the plaintiff to use all necessary diligence and care in accepting the best available price for such unsold salmon. The law imposes this duty upon the plaintiff in order that the damage growing from the alleged breach of the contract may be reduced as much as possible, and if you find from the evidence in this case that the plaintiff on or about the 5th of February, 1908, or at any date after the breach of the contract on the part of the defendants, if it was breached, was offered 80 cents a dozen or $3.20 a case, for the salmon on hand and unsold, it was the duty of plaintiff to have accepted said offer, and to have sold said salmon, and if such offer was made by a bona fide purchaser to the plaintiff for said salmon, and the plaintiff refused to accept said offer, then I instruct you that the measure of plaintiff's recovery in this action is the difference between the 10,903 cases of salmon at $3.20 a case and the alleged contract price, or $3.60 a case; or in other words, the plaintiff cannot recover in this action any sum in excess of $4,461.20, exclusive of the item of interest about which you are to be hereafter instructed; and I further instruct you that it is immaterial whether this offer was made by the defendants or any of them to the plaintiff.

34 Instruction III.

If you find from the evidence in this case that the plaintiff did on or about the 5th day of Februay, 1908, receive and offer said $3.60 a case for the salmon in question, and did not accept the same, then I instruct you that the plaintiff cannot recover any sum whatever on account of any expenses, discounts, commissions, exchanges, insurance, storage or other charges connected with the handling of salmon subsequent to February 5th, 1908. Neither can the plaintiff recover anything whatever on account of any interest charges accruing subsequent to said February 5, 1908.

35 Instruction IV.

If you find from the evidence in this case that the plaintiff took over the salmon in question on or about February 1, 1908, and continued to hold said salmon until July, 1908, without selling the same when it had had an opportunity to sell the same upon the market at the market price, then I instruct you that such action on the part of the plaintiff in withholding the sale of the salmon from February 1, 1908, to July, 1909, was an unreasonable retention of the salmon and a violation of the duty of plaintiff to sell the salmon

upon the open market within a reasonable time after the alleged breach of the contract of February 1st, and in that event, I instruct you that plaintiff cannot recover in this action any sum whatever on acount of commissions, discounts, storage, insurance or other charges accruing in connection with the handling of the salmon, or the sale thereof, subsequent to February 1, 1908, and plaintiff is limited in its right to recover to the difference between the market value of the salmon on or immediately after February 1, 1908, and the contract price, which would in no event exceed such difference as heretofore stated to you in these instructions, and alleged by the plaintiff in its complaint which you will take with you to your jury room.

36 Instruction V.

As I have heretofore instructed you, it was the duty of the plaintiff within a reasonable time after the alleged breach of the contract on February 1, 1908, to have sold said salmon upon the market at the best obtainable price, and if you find that the plaintiff did not sell said salmon within a reasonable time after February 1, 1908, at the market price, but elected to hold said salmon until July, 1908, then I instruct you that the plaintiff cannot recover upon any of the items stated in its complaint for insurance, storage, commissions, discounts or other expenses, or for interest accruing subsequent to February 1, 1908, or from the date within which plaintiff might have sold said salmon if the price of salmon had advanced after February 1, 1908, to a point in excess of the contract price, then the plaintiff would have been entitled to the benefit of such excess price over and above the contract price, and would have been under no duty or obligation to account therefor to the defendants, if you find that a breach of the contract upon the part of defendants occurred on or about February 1, 1908. Therefore, the law will not permit the plaintiff to hold the salmon for an unreasonable time after the date of the breach in expectation of a rise in prices, and at the same time permit the plaintiff to charge against the defendants the cost and expense of carrying the salmon, and the cost and expense of selling the same, nor would it allow the plaintiff to charge the defendants with interest during such period.

"For the seller of a commodity such as salmon, cannot upon the buyer's failure to take it, keep it in order to profit by a rise in the market, and charge the buyer with the expense of such keeping if at the time of delivery there is a market price and sale for the commodity."

Thurman vs. Wilson, 7 Ill. App. 312.
43 Cen'y Dig. Paragraph 1101, Sub. Div. C.

37 Instruction VI.

If you find from the evidence in this case, that the defendants agreed to take all of the unsold salmon of the 1907 pack belonging to the plaintiff on February 1, 1908, at the opening price of salmon for such 1907 pack, then I instruct you that the plaintiff had a choice of remedies as follows:

1st. The plaintiff could have stored the goods and held the same subject to defendants' orders, and have sued for the contract price; or

2nd. The plaintiff could sell the property after notice to the defendants, and recover the difference between the price received, using due diligence to attain the highest available price, and the contract price; or

3rd. The plaintiff could have retained the same as its owner and have recovered the difference between the market value of the same at the time and place of delivery and the contract price, if the market price was less than the contract price.

But, the plaintiff could not avail itself of all three of these remedies, and if you find from the evidence that the plaintiff in the first instance, adopted the third remedy and elected to retain the property as its own and held the same from February 1, 1908, to July, 1909, and refused to sell the same upon the market between such dates, then I instruct you that such action on the part of the plaintiff would estop the plaintiff from thereafter electing to avail itself of either the first or second remedies just described and defined to you; and if you find that such action on the part of the plaintiff in not selling said goods on the market between February 1, 1908, and July 1, 1908, amounted to an election of choice on its part to avail itself of the remedy of taking over the goods as its own, then I instruct you that this action was not predicated upon such a theory, and the plaintiff must fail in this action, and cannot recover against the defendant- for any sum whatever, and your verdict must be for the defendants.

38 Instruction VII.

If you find from the evidence, however, that the plaintiff elected to sell the property within a reasonable time after the alleged breach after notice to the defendants, and elected to recover the difference between the price received and the contract price, then I instruct you that the plaintiff is limited in its recovery to the difference between what it could have realized from the property and the contract price, but the plaintiff would not be entitled to any credit for storage, insurance, commissions or expenses of sale or interest except for the short period of time between February 1, 1908, and the date within which said salmon might have been sold, for the plaintiff under the law could not hold the goods at great expense to the defendants for a longer period of time, taking the benefit to itself of possible advance in prices, and at the same time charging the defendants with the burden of such expenses and charges, including interst charges, and I instruct you that the withh/lding of the salmon in question, or a greater portion of it, from February 1, 1908, until the early part of the year 1909, was as a matter of law, an unreasonable length of time to hold the same, and you are instructed in this case to disregard all claims for storage, insurance and interest charges accruing subsequent to February 5, 1908, if you find that the plaintiff had an opportunity to sell said salmon on February 5, 1908, for any reasonable sum whatever, and I particu-

larly instruct you that it was the legal duty of the plaintiff to have accepted the offer of 80 cents a dozen for the salmon in question if such offer was made to the plaintiff by the defendants or any one else on February 5, 1908, or approximately said date.

39 Instruction VIII.

If you find from the evidence in this case that the opening prices for salmon for the pack of 1907 were fixed by a combination of brokers, and that it was contemplated at the time the alleged contract was made that the opening prices for salmon *was* to be fixed by a combination of dealers in canned salmon, then I instruct you that such contract based upon such an element for the determination of the opening prices of salmon for the year 1907, was contrary to public policy, against the law, and therefore an illegal contract, and the plaintiff, if it had knowledge at the time the contract was made that the opening prices of salmon were to be determined by such agreement among brokers, then I instruct you that the plaintiff cannot recover in this action, for the law does not permit any party to recover upon an illegal contract and does not permit the enforcement of such a contract, and will leave the parties to such a contract in the position in which they find themselves.

40 Instruction IX.

If you find that the opening price of salmon was not intended to be fixed by a combination of brokers but that the opening price for the pack of 1907 was simply the market price at such time, that is about the time of the completion of the pack, and if you find that on or about the 26th day of August, 1907, the salmon similar to that in question was being sold in the open market for less than 90 cents a dozen for pink flats salmon, then I instruct you that in reaching a conclusion as to what is, or was, the opening price of salmon, on or about the 26th day of August, 1908, then I instruct you that you are authorized to take into consideration in determining what the marketable opening price of salmon was at that date, any evidence showing or tending to show sales of salmon of the grade and character in controversy here, and the prices at which it was sold. In other words, you are entitled to take into consideration all the evidence in this case in reaching a determination as to what the opening prices of salmon were for the pack of 1907.

41 Instruction X.

If you find from the evidence in this case that the defendants agreed to take certain portions of plaintiff's salmon prior to February 1, 1908, and agreed to pay therefor a certain price within ten days after the delivery of the goods and did not pay for the same within said ten days although they had agreed to do so, then I instruct you that the plaintiff is not entitled to recover anything on account of interest for the time in excess of such ten days, because there is no proof that the defendants agreed to pay any interest thereon and therefor.

42 Instruction XI.

If you find from the evidence that the defendants agreed to take a portion of said salmon prior to February 1, 1908, and that it did take a portion thereof, and further find that the plaintiff did not agree to pay for the same within ten days after delivery, then I instruct you that the plaintiff is not entitled to recover any interest on this account.

Filed May 4, 1910. R. G. Glen, Clerk. By S. E. Leitch, Deputy.

43 In the Superior Court of the State of Washington in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Clerk's Certificate.*

STATE OF WASHINGTON,
*County of Whatcom, ss:*

I, R. J. Glen, clerk of said Superior Court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the records and files in the above entitled cause as I have been directed by the appellants to transmit to the U. S. circuit court.

In testimony whereof I have set my hand and the seal of said superior court, this 25th day of August, A. D. 1910.

[SEAL.] R. J. GLEN, *Clerk.*

Indorsed. Filed Aug. 26, 1910. R. J. Glen.

44 In the Superior Court of the State of Washington in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Statement of Facts.*

Filed October 10, 1910. C. S. Reinhart, Clerk.

Filed Jun- 10, 1910. R. J. Glen, Clerk. By S. E. Leitch, Deputy Clerk.

45 In the Superior Court of the State of Washington in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

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48 In the Superior Court of the State of Washington in and for the County of Whatcom.

No. 9418.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Defendants.

*Statement of Facts.*

Be it remembered, that on the 29th day of April, A. D. 1910, at the hour of 9:30 A. M., the above entitled and numbered cause came on for trial before the Honorable Ed E. Hardin, one of the Judges of the Superior Court of the State of Washington, in and for the county of Whatcom, proceeding in Department No. 1 thereof, at the Whatcom County court house at Bellingham, Washington, a jury having been duly empaneled and sworn to try said cause, the plaintiff herein appearing by its attorneys Fairchild & Bruce, by S. M. Bruce, Esquire, and Dorr & Hadley, by C. W. Dorr, Esquire, and the defendants appearing by their attorneys Kerr & McCord, by E. S. McCord, Esquire, and all parties having announced themselves ready for trial:

Whereupon the following proceedings were had and testimony given, to-wit. (Opening statement by Mr. Dorr.)

Mr. FRANK WRIGHT, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination by Mr. BRUCE:

Q. Your name, please?
A. Frank Wright.

Mr. MCCORD: On behalf of E. B. Deming and Pacific American Fisheries I object to the introduction of any testimony upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and I make the same objection on behalf of the Deming-Gould Company.

49 The COURT: The objection will be overruled. (Exception allowed.)

Q. Where do you reside?
A. For about six months in Seattle and six months at Lummi Island.
Q. What is your business?
A. The catching and packing of salmon.
Q. Are you associated with or managing any company or corporation engaged in that business
A. I am the president and manager of the Carlisle Packing Company.
Q. How long have you been connected with the Carlisle Packing Company?
A. Seven years.
Q. Where is its place of business located?
A. At Village Point, Lummi Island.
Q. What is the capacity of the Carlisle Packing Company, ordinarily?
A. It is a two line cannery, the capacity is 2200 cases a day.
Q. What were you doing in the months of February and March, 1907?
A. I was getting finances and getting ready to start for the season of 1907.
Q. In what capacity were you working with respect to the Carlisle Packing Company at that time?
A. General manager.
Q. Do you remember having any conversation with Mr. E. B. Deming upon the subject of the salmon pack of that season?
A. Yes sir.
Q. Did you have more than one conversation?
A. Yes sir.
Q. Where were the conversations held?
A. In Mr. Deming's office at South Bellingham.
Q. Can you tell about the time of their occurrence?
A. I think it was in March, but I am not sure of the exact time.

50 Q. Who was present, if anyone, at the time of these conversations?
A. Mr. Arthur Wadhams.

Q. Anyone else?

A. No sir.

Q. What was the nature of these conversations; just tell what was said between you at that time?

A. We went there to make a can contract, and Mr. Deming made a proposition to handle the pack of the Carlisle Packing Company for 1907.

Q. In connection with the can contract, was it?

A. No, it had nothing to do with the can contract.

Q. What did he say about handling the pack of 1907, at that time?

A. He offered to take the entire pack of 1907 at the opening price.

Mr. McCord: Just state what he said, the conversation.

A. That was what he said. His proposition was that he would take the entire pack at the opening price, and pro-rata the packs between the Pacific American Fisheries and the Carlisle Packing Company, paying for what was sold and shipped on ten days' sight drafts and take all of the remaining pack on the first day of February, and pay for it.

Q. What did you say to his proposition at that time, if anything?

A. I was not in a position to give him an answer at that time; I had to talk with others, and I was not in a position to give him an answer at that time.

Q. Did you have any further conversations with him?

A. Yes, sir. After going to Seattle and coming back again, Mr. Wadhams and I went to him, and I accepted his proposition.

Q. What did you tell him when you accepted his proposition?

A. I told him I would accept his proposition for handling the pack of 1907.

Q. Was anything said at that time about the pro-rata shipments?

51 A. No, that was understood before. He said he had no contract forms, but he would fix it up and send it to me.

Mr. McCord: I move to strike as to what was understood, tell what was said.

The Court: That may be stricken.

Q. Eliminating that from the record, repeat the words he used and the words you used, as well as you can, what the substance of that conversation was, that second conversation?

A. I told him I would accept his proposition for handling the pack of 1907, and he said that was all right.

Q. Did you say anything further, again, about what that proposition was, at that time, did you repeat it, or talk it over again?

A. Yes sir; we went in- the details.

Q. State the details of that, or the substance of it?

A. It was agreed that he should take the whole pack——

Mr. McCord: I object to what was agreed to; give the conversation.

A. (continued). He said he would take the whole pack.

Q. What about the payment?

A. He should pay for them as shipped, ten days' sight draft, and the balance to be paid for on the 1st day of February; first it was to be on the 1st of January and he amended that to the first of February, 1908.

Q. So that the pack of 1907 should be closed not later than February, 1908?

A. Yes sir.

Q. And everything paid for?

A. Yes sir.

Q. Was there anything said about the storage of the fish, at that time?

A. Not at that time, no.

Q. Was there anything said about the storage of the fish?

52 A. I think it was in December that I met Mr. Deming and he suggested that I should ship the pack over to his warehouse over in South Bellingham, as the time was getting so short and there would be no storage on it, and it would be easier to handle it there.

Mr. McCORD: What time was that?

A. I think it was in December.

Q. What did you do after that?

A. I shipped the remaining pack to South Bellingham.

Q. Prior to that time had any of the pack been shipped, or paid for?

A. Oh, yes.

Q. About when did you begin to deliver the fish to Mr. Deming, as near as you can remember, after you had this conversation with him?

A. I do not believe we delivered anything until October; I am not sure. It was either September or October.

Q. Your contract was made in the early spring, before the pack was put up?

A. Yes sir.

Q. What portion of the pack did you deliver to Mr. Deming or to his order in all?

A. I do not understand the question.

Q. How much of your season's pack did you deliver under that contract to Mr. Deming, or to his order, or on his request?

A. I delivered it all.

Q. All of it?

A. Yes, sir.

Q. You approximate the time of the final delivery or when you delivered the final total of the pack, when?

A. It was delivered to the Bellingham Warehouse Company in December.

Q. December of 1907?

53 A. Yes sir, November or December.

Q. Can you tell who had charge of that warehouse?

Mr. McCORD: I object as asking for a conclusion. That have

no right to draw any conclusions at all as to who had control of it. I object as irrelevant, incompetent and immaterial. It does not make any difference whether Mr. Deming or anybody else had control of it.

The COURT: I think you should tell the facts. If anyone was acting or assuming to act in apparent control you can show those facts, but this would call for a conclusion of the witness without giving the jury the facts on which that conclusion would be based.

(Last question read.)

The COURT: He may answer.

Mr. MCCORD: I object as incompetent, irrelevant and immaterial.

The COURT: Objection overruled.

A. I do not know who had charge of the warehouse, Mr. Deming called it his warehouse.

Mr. MCCORD: I move to strike that as not responsive, immaterial, a voluntary statement, irrelevant, incompetent, immaterial, and a voluntary statement that has nothing to do with this case.

The COURT: I think that should stand.

Q. How did you come to deliver the fish at that warehouse?

Mr. MCCORD: I object as incompetent, irrelevant and immaterial. He says he delivered the goods to the Bellingham Warehouse Company's warehouse, which is a corporation organized under the laws of this state, I presume, and that delivery to a corporation is not a delivery to any of the defendants sued here.

The COURT: I think you are getting ahead of the matter—just tell the facts and circumstances in connection with it.

A. Mr. Deming said it was a matter of utility in handling the goods to have them there; some were unlabeled, and it was over there it would be easier labeled and the time was so short
54 until the 1st of February, there would be no storage on it any way.

Mr. MCCORD: I move to strike the answer as not being responsive, incompetent, irrelevant and immaterial.

The COURT: The answer may stand.

Q. What arrangement, or what conversation had you had with Mr. Deming about his taking some of these cans unlabeled and some labeled, if you had any?

Mr. MCCORD: I object to the question as to — his understanding was. They are suing on a contract here, which was made in March, if there was anything said at that time in regard to the contract, let him state what the contract was, and what was said afterwards.

THE COURT: I understand this is calling for the very thing you suggest; what conversation he had with Mr. Deming pertaining to the labeling. If that was a part of the original contract that was overlooked, supplemental to the original contract or in whatever way it may have come up. If it is a matter of detail in connec-

tion with that contract, he can explain it. I think the question is proper, the objection is overruled.

A. A packer of salmon is supposed to label his salmon.

Mr. McCORD: I object to what they are supposed to do. I object as incompetent, irrelevant and immaterial, and giving a conclusion and not responsive.

The COURT: Just state the facts.

A. Where the salmon is not labeled we allow a label allowance, but if we label it with our own label, or with his label we pay for the labeling. We are supposed to complete the labeling, and if he buys it unlabeled we allow the label allowance.

Mr. McCORD: I move to strike that answer on the ground no custom has been pleaded. Nothing of this kind was in the contract. I object to it as incompetent, irrelevant and immaterial and not within the pleadings.

55 The COURT: Go ahead.

A. Salmon is sold both labeled and unlabeled, and when it is sold unlabeled we allow the label allowance. The salmon cannot be labeled until it is sold. Sometimes it is sold under our own label, and sometimes under another label.

Mr. McCORD: I move to strike the whole answer as being incompetent, irrelevant, and immaterial and not within the issues. No custom has been alleged as a part of this contract.

The COURT: We will see what he says in connection with this matter. I cannot tell yet.

Q. What have you to say about any part of these fish being delivered unlabeled and what was the conversation, if any, between you and Mr. Deming respecting that matter, at that time?

Mr. McCORD: I object as being too indefinite. He should state the time and place of the conversation unless it was a part of the original conversation. It is not within the issues of the case.

The COURT: You may answer the question and give the time and the place, if you remember, and the circumstances.

A. The conversation with Mr. Deming—Mr. Deming always instructed us under what label he wanted the pack of 1907. We had labels of our own for these pinks which he agreed we should use, and we used that label as far as it went, and the balance was unlabeled, we did not have labels for it.

Q. Do you know what quantity you delivered there unlabeled?

A. No, not off-hand, I cannot say.

Q. What was the contract, or what was said, rather, between you and Mr. Deming as to the use of his labels or labels to be provided by himself?

Mr. McCORD: I would like for the witness to fix the time of these conversations; this way, we have no opportunity to meet the thing.

The COURT: You will have a chance to cross-examine, but
56 in these matters, if you can give the time and the place, do it.

Mr. BRUCE: I intended to follow that as far as I could.

A. Whenever he wanted a car load of salmon under his label he instructed us and sent the labels and we put them on; it was under his direction when we labeled with our own label.

Q. When did you have the first conversation with him on the subject of labeling the salmon?

A. Not until after the pack was up; that would be in September.

Q. And where was the first conversation held on that subject of the labels?

A. In Mr. Deming's office.

Q. Were there any labels at that time belonging to you that you could use?

A. We had a sockeye label he would not use and I had it blocked and I think we used some on that pack.

Q. What was his objection; what was the object of using labels in that way instead of using them without being blocked?

Mr. MCCORD: I object as incompetent, irrelevant and immaterial. Any claim as to labels is not mentioned in the complaint, and it is incompetent, irrelevant and immaterial.

Mr. DORR: The net amount involves the labeling allowance. If the fish was sold unlabeled there was a label allowance made.

Mr. MCCORD: There is nothing in this complaint to indicate it. You said it was sold at 90c. a dozen. There is no allegation in the complaint showing two kinds of salmon sold here.

Mr. DORR: I am speaking of the fish we sold you did not take. (Question read.)

The COURT: Let him answer. (Exception allowed.)

Mr. MCCORD: That is certainly immaterial.

The COURT: It does not seem at this time to be material. The Court is not a cannerynan and the jury is not; I will have to allow some latitude at this time. This is a part of a series of ques-
57 tions pertaining to this matter. If it proves to be incompetent it will be stricken on motion.

Q. I will put the question this way, and ask the witness why those labels were blocked instead of being sold with the pack of the Carlisle Packing Company there?

Mr. MCCORD: That is proper on cross-examination, but certainly it is not proper for him to make a statement and give his reasons for it on direct examination.

The COURT: I think the witness should state the facts as he understands them; I do not see why he should argue in support of his statements.

Mr. DORR: We propose to show this labeling business was carried on under the direction of the defendants.

The COURT: Take it in chronological order and tell what was said and done.

Q. I will withdraw the two last questions and now ask the witness to give the conversations which he had with Mr. Deming relative to the blocking of the labels that he has mentioned and the placing of the labels on the cans.

A. There was only one label blocked, that was blocked for the purpose of conforming to the pure food law. I do not know that it makes any difference; it was one of their own labels.

Q. Did you have a conversation with Mr. Deming about it?

A. Mr. Deming showed me how to block it, what to strike out on it.

Q. You say you blocked it; you say you blotted certain things on the label?

A. Yes sir, I blocked out certain words and then took them to the printer and had the printer block out those parts on the labels. You see if we were selling pink salmon under this label and it had the name sockeye on it we had to block out the word "sockeye."

The COURT: You eliminated that?

58 A. Yes sir.

Q. When this salmon was delivered to South Bellingham did you receive warehouse receipts for it?

A. Yes sir.

Q. What are the facts about the use of warehouse receipts?

A. The Bellingham Warehouse Company issued warehouse receipts against this salmon as it was placed in the warehouse and I endorsed them over to the bank for the money.

Q. What, if anything, was said between you and Mr. Deming about that arrangement?

A. I do not know that we had any conversations much about that. He advised me to ship the salmon over and have it placed in that warehouse, and I had, of course, to take the warehouse receipts against it, as there was warehouse receipts for it in our own warehouse.

Q. Was Mr. Deming informed of that?

A. Yes, sir, he knew all the circumstances.

Q. Why had you taken these warehouse receipts?

A. The salmon was not paid for and we had to have something to secure the bank until the pack was paid for.

Q. The bank was financing you?

A. Yes sir.

Q. The bank was furnishing you money to continue your business?

A. Yes sir.

Q. And that was the form of security you gave the bank?

A. Yes sir.

Q. What I want you to testify to fully now, is what knowledge Mr. Deming had of that fact, if he had any?

A. He knew all the circumstances in connection with it. We had talked it over.

Q. When the fish were transferred to the Bellingham

59 Warehouse Company the warehouse receipts theretofore issued by the Carlisle Packing Company were cancelled, and the Bellingham Warehouse receipts were taken up?

A. Yes sir.

Q. Those facts, you say, were known to Mr. Deming?

A. Yes sir.

Q. How had he been advised of those facts?

A. When he wished to make a shipment out of this fish that was shipped over, he was instructed to go to the bank and take out the warehouse receipts first before the shipment was made.

Q. He was to take care of the warehouse receipts in the shipment?

A. Yes sir.

Q. And had that practice prevailed with respect to the fish that had already been taken and sold?

A. Yes sir, except in cases of a shipment that was made by us before the panic, amounting to, I think, $23,000.00, and those were not paid for.

Q. Those were not paid for?

A. No sir.

Q. Who made the shipment of this $23,000.00, you spoke of?

A. The Carlisle Packing Company made the shipment to the Pacific American Fisheries, under his instructions.

Q. And that shipment went without regard to warehouse receipts or other conditions, no warehouse receipts against that?

A. No sir, that went to the Pacific American Fisheries.

(Whereupon court adjourned until the hour of 1:30 P. M. of the same day, at which time court was opened pursuant to adjournment, and the trial of this cause proceeded as before.)

Mr. FRANK WRIGHT resuming the witness stand and examined by Mr. Bruce:

Q. I wish you would state as fully as you can what was said at the time you made your contract, about the quantity of fish
60 that should be shipped, if anything was said along that line, in proportion to other fish that was to be handled by Mr. Deming?

A. The Carlisle Packing Company's pack and the Pacific American Fisheries' pack was to be pro-rated.

Q. What do you mean by pro-rated?

A. If the Pacific American Fisheries had 100,000 cases and we 10,000 cases, they would ship in that proportion.

Q. Ship at the rate of 1 in 10 from each pack?

A. Yes sir.

Q. What was your arrangement that year for financing your business?

A. We financed with the First National Bank of Bellingham.

Q. And did you discuss that matter with Mr. Deming, and if you did what was said about that?

A. I discussed it with Mr. Deming and told him—we financed before with our broker, our broker financed us, but this time we went to the bank and it was on the strength of this contract that I got this financing.

Q. You detailed that to Mr. Deming?

A. Yes sir.

Q. Where was that conversation?

A. At his office.

Q. And it was to carry out the arrangement with your financier that you—was anything said at that time to Mr. Deming of your financial arrangement, about how you were securing the bank or obtaining advances?

A. Yes sir.

Q. What was said?

Mr. McCord: I object as incompetent, irrelevant and immaterial.

The Court: You can tell the conversation had between yourself and Mr. Deming.

61 A. I told Mr. Deming at the second meeting that the First National bank had agreed to finance me on that contract, taking the warehouse receipts for the pack as it was packed.

Q. Was that at the time you closed the contract?

A. Yes sir, at the second meeting.

Q. This was a part of the conversation leading up to the final acceptance of his proposition?

A. Yes sir.

Q. What was said in that contract about when the payments should be made, if anything?

A. All shipments before the 1st of February was to be paid on ten days' sight drafts.

Q. And what was said about the shipments subsequent to the 1st of February, if anything?

A. They were to be taken and paid for on the first of February, whether shipped or not.

Q. As I understand you, then, all your shipments were to be paid for within ten days from the time they were turned over or delivered?

A. Yes sir, except *was* was not sold on the first of February, that was to be paid for.

Q. All that was not shipped prior to February 1st, was to be paid for and the contract terminated?

A. Yes sir.

Q. And what, if anything, was said about the amount of money you were to receive on the bills of lading or shipments made, calling your attention to the question of discounts or percentages?

A. The full amount of the invoices less 1½ and 5, 1½ cash discount and 5% commission.

Q. In other words, he was taking the pack on the same basis as he would—on brokerage?

A. Yes sir.

Q. Was this item of 1½ and 5% applicable to the fish that were not delivered on the 1st of February?

62 A. Yes sir.

Q. So the real contract was the opening price less 6½%?

A. One and one-half and five.

Q. That would make 6½% off?

A. Yes sir.

Q. You spoke something about having made a contract with Mr. Deming for cans?
A. Yes sir.
Q. And what was that contract?

Mr. McCORD: I object as immaterial; the witness has already stated——

Q. I will not press that. I will ask you to state to the jury who furnished you the cans in which your pack was put for that season?

Mr. McCORD: I object as immaterial.
The COURT: The objection is sustained.
Mr. BRUCE: I think we will come to that later, but I will not press it at this time.

Q. Does the Carlisle Packing Company keep books?
A. Yes sir.
Q. Do you have the books here with you showing the business of the season of 1907?
A. Yes sir.
Q. Under whose directions are those books kept?
A. They are kept under my direction.
Q. They are kept in the usual course of trade or business?
A. Yes sir.
Q. Showing the entries of the several business transactions as they occur?
A. Yes sir.
Q. Are the books correctly kept?
A. Yes sir.

Q. Were the transactions involved in the handling of the
63 pack of 1907 entered in those books?
A. Yes sir.

Q. As they severally came along?
A. Yes sir.
Q. And do they appear correctly in those books.
A. Yes sir.
Q. Are you familiar with those several transactions and the book records?
A. Yes sir.
Q. You knew at the time they were entered they were being entered in accordance with the facts as they occurred at that time?
A. Yes sir.
Q. I will ask if these books here (indicating books of account of plaintiff company) are the several books belonging to the Carlisle Packing Company and that show these transactions?
A. Yes sir.
Q. Can you tell the condition of the business between the Carlisle Packing Company and the defendants on the 1st of February, 1908?
A. Yes sir.
Q. What was the condition of the accounts on the 1st of February, 1908?

A. The Pacific American Fisheries owed $52,000.00 in addition to those 10,900 cases of flat pinks.

Q. They owed $52,000.00 and owed all that was due on the flat pinks?

A. Yes sir. On February 5th they paid the $52,000.00, leaving a balance of $28,458.25.

Q. That was the amount you subsequently received, wasn't it; they owed you at the time 90 cents a case——

A. That was what it first sold for under the sale.

Mr. McCord: Let me ask one or two questions: are you stating from your memory or from knowledge gained from an examination of your books?

64 A. I remember it very distinctly, of the many transactions, what was paid at that time.

Mr. McCord: I mean what was owing you; you gathered this information from your books, did you not? (No answer.)

Mr. Bruce: I submit that is cross-examination, it is not proper at this time.

The Court: I think that is proper.

Mr. McCord: I move to strike out his answer on the ground that he is testifying from what he has gathered from the books.

The Court: I do not know yet.

Mr. Dorr: No objection to the answer being stricken at this time.

The Court: It may be stricken.

Mr. McCord: I move to strike all the answers of this witness on this matter because it is manifest that from the witness's answers to my questions that he gathered his information from the books.

The Court: The motion will be denied at this time. He said he had some recollection about it, as I remember.

Q. I will ask if the $52,000.00 was paid?
A. Yes sir.
Q. When?
A. February 5th.
Q. And where was that payment made?
A. It was paid to the First National Bank of Bellingham.
Q. Who was present at that time.
A. Mr. Purdy.
Q. Who else.
A. Mr. Deming.
Q. And yourself?
A. Yes sir.

Q. Up to that time, what, if anything, had taken place
65 relative to the disposition or further disposition of this 10,914 pink flats?

A. Mr. Deming refused to take any pay for the pink flats.
Q. When did he first refuse to take *and* pay for them?
A. The 5th of February.
Q. Where were the fish at that time?
A. In the Bellingham Warehouse Company's warehouse.

Q. The same fish that had been taken over previously, that you testified about this forenoon?

A. Yes sir.

Q. And that was the first intimation you had had that he was not going to take them?

A. Yes sir.

Q. Are you acquainted with what those fish were worth at that time on the market or what the market was?

A. There wasn't any market at that time.

Q. There was no demand for such fish?

A. No, no demand for that grade of fish.

Mr. McCord: I move to strike out the answer, as the witness is not shown to have any qualifications to answer.

The Court: You will be permitted to cross-examine him on that. He is shown here to have some knowledge of this business. I think there is evidence tending to establish that thing. You will be given a chance to cross-examine the witness. Let the testimony stand and the jury determine whether it is worth anything.

(Exception allowed.)

Q. What was the conversation between yourself and Mr. Deming about how much was to be paid for these pink flats?

A. He offered 80 cents for the pink flats, but I refused.

Q. I am talking now of the first conversation you had, when the contract was made.

A. We did not know we had any at that time.

66 Q. Was anything said about what price the fish were to be sold at?

A. At the opening price, the opening market price.

Q. Do you know what the opening market price of pink flats was?

A. The market opened at 90 cents.

Q. When did that market open?

A. The latter part of September, I think—it was late that year.

Q. And the first intimation you had that he was not going to take them at that price was on the 5th of February?

Mr. McCord: I object to the question, counsel has asked that 5 times already.

The Court: I think it has been answered.

Q. I will ask you to state whether there were loans made or money borrowed on this fish from the bank, and if so what rate of interest you were paying?

Mr. McCord: I object to the question as being wholly immaterial under the issues in this case, whether any money was borrowed or whether it wasn't. The thing sued upon here is the alleged breach of a contract.

The Court: Is it your theory that in case the plaintiff was entitled to recover, and it should appear that payment was withheld that legal interest, at the legal rate, is not a matter of damage?

Mr. McCord: That is not alleged, your honor. They have gone

on a different theory. It is not an element of damage when they are not proceeding upon that theory. I object to the introduction of any testimony as to interest as an element of damages for interest that accrued on a loan from the First National Bank of Bellingham, or from any body else, under the issues of this cause. They were not suing for the difference in the market price of the goods at the time of the breach, but they are suing for the difference between what they got for the goods and the market value
67 at a certain time; in addition, they are endeavoring to recover interest on a loan made by the Carlisle Packing Company from the First National Bank of Bellingham. It is not an element of damages in this case, and cannot be so construed.

The COURT: I had an idea that this was in effect a suit for the difference between the contract price and the market price together with certain things that are alleged to have been expended by the plaintiff preceding the breach, and if I am wrong, let us find out just what it is.

Mr. DORR: The issues, I think, are clearly defined. Under the rule there are three remedies that may be pursued in these cases, and the plaintiff has sought one of these three well defined remedies namely; to make a re-sale and sue for the difference between the contract price and the proceeds of the re-sale; that carries with it interest from the date that the plaintiff was entitled to his money had the original contract been carried out, which would be the 1st of February, 1908, and our contention is that he is entitled to the difference between the contract price and the proceeds derived from the re-sale, and that this should draw interest from the date on which the plaintiff was originally entitled to its money, if the contract had been kept; in addition to that there is an interest demand upon the deferred payments upon the sales that had been executed before the first day of February, which draws the same rate. I now concede that while it is claimed at the rate of 8% it should be reduced to 6.

Mr. BRUCE: I will ask that the complaint be taken as amended so it will proceed on the rate of legal interest instead of 8%. I will withdraw the question.

Q. After the 5th of February, 1908, how long a time elapsed before you had any further dealings concerning this quantity of pink salmon or these 10,914 cases, with Mr. Deming?
68 A. I notified him that I was going to sell in June, 1908.
Mr. MCCORD: In writing or orally?
A. I had my attorneys notify him.

Mr. MCCORD: I move to strike out the answer as hearsay, not the best evidence.

The COURT: I do not know whether he knew the attorneys did it or not. I will let the answer stand.

Q. Then what disposition did you make, or——

Mr. MCCORD: I think this is purely hearsay. Let me ask a preliminary question. Did your attorneys notify him in writing?

A. Yes sir.

Mr. McCord: I object as not the best evidence, the writing is the best evidence.

The Court: It would be unless you have lost it or something.

Mr. Bruce: I am not asking about the contents of this notice.

Mr. McCord: I move to strike the entire answer.

The Court: It may be stricken.

Mr. Bruce: I now ask for the letter. I ask counsel to produce the letter which was written by Dorr & Hadley upon the 2nd day of June, 1908, addressed to the defendants in this case.

Mr. McCord: We have no letter of that sort that I know of.

The Court: Perhaps you have a duplicate (addressing Mr. Bruce)?

Mr. Bruce: We will take that matter up later.

Q. I will ask you to state when you took possession of the salmon or proceeded to make a disposition of it, if you can tell us?

A. In July, 1908.

Q. Now, what did you do in the way of disposing of that salmon?

A. Immediately after he refused to take them I offered them—or at least, I tried to get a bidder for them and tried to sell them. I made inquiry not only through the brokers but through the buyers all over the United States, and could get no reply or offer for
69 them at any time up to July, 1908.

Q. During that period where were the fish?

A. At the warehouse.

Q. The same place?

A. Yes sir.

Q. In July what did you do?

A. I commenced to sell in July.

Q. Have you any memoranda that will enable you to show to whom you made those sales?

A. Yes sir.

Q. And how much, the amounts of the sales?

A. Yes sir.

Q. Do you know about when you made the final disposition of the fish?

A. In August, 1909.

Q. And were these transactions entered in your books?

A. Yes sir.

Q. You had the personal charge of making these sales and disposition of the goods?

A. I did.

Q. And can you refresh your memory from the data which I give you so you can tell the disposition that was made of the fish and in what proportion (hands witness paper)?

Mr. McCord: I object to the question on the ground the paper is not a proper one from which the witness can refresh his memory.

Mr. Bruce: I now offer in evidence the books of the Carlisle Packing Company as identified by the witness, including the 5 volumes here.

Mr. McCord: Are these transactions in these particular matters embraced in all those books?

Mr. Bruce: It is embraced in each of them, I think.

70 Mr. McCord: I object to any blanket offer like that, your Honor. I contend the statement of this witness as to the amounts he realized from the sales through brokers is only secondary evidence. He is testifying from reports that may have been made him from time to time.

The Court: They have asked a question here, I think, that calls for the transactions had.

Mr. Dorr: Independent of this statement we are prepared to show that every one of these sales is to the parties that purchased the salmon direct, not to the broker at all. In addition to that we will show the orders for the salmon. We will show that the bills were made for the salmon by the witness or under his direction, rather, and that with every one of those bills sight drafts were drawn accompanied by bills of lading, and that was put through the bank, and every date on it can be shown by the bank's books.

The Court: We are all anticipating trouble, I think. With respect to these books here offered I suggest that you make up an abstract showing what particular pages or parts of the books you want to exhibit and not put in the books as a blanket proposition. I think the question now is upon the admission of these books.

Mr. Bruce: I offer now in evidence the journal as it appears on page- 165 and 166.

The Court: Is there just one journal in this set of books or is that a numbered book?

Mr. Bruce: There is just one journal.

Mr. McCord: I object to that as not properly identified. It does not show that it is a book of original entry. It does not show the entries were made at the time.

The Court: I understood he went into that, but if there is any question about it you can take up the matter and see whether the books have been properly kept. I understood he testified

71 they were kept under his supervision. I will overrule the objection.

(Exception allowed defendants.)

Mr. Bruce: I will read these entries into the record; this is on the pack of 1907——

The Court: I suggest that you go over these entries and then if they are admitted, that you gentlemen let a summary or condensed statement of those be put in, instead of having the jury wrestling with all these books and the different pages of them.

Mr. McCord: I object to this journal for the reason it shows a summary of the business done, showing clearly it is made up from some other books, and that it is not a book of original entry. I make the further objection on the ground it is not properly identified, and on the ground it is a mere summary and not a book of original entry at all. It is not a book that purports to be made at the time the transactions were made, because it is a mere copy of a statement they have made up, gathered from a line of entries cover-

ing a period of two years down to September, 1909. It is a copy of a statement prepared from the books covering this entire transaction with the salmon, and at the end putting in the result of what other books of the company may have shown. It is a statement itself.

The COURT: If that is correct you will have to go back to the foundation.

Mr. BRUCE: I will offer all of these books together.

The COURT: This is not offered right now?

Mr. BRUCE: Yes; I withdraw that now. These books are made up in this way. An order would come to the plaintiff for fish; that order would be filled by taking it out of the warehouse and taking up the warehouse receipts and shipping the property, and when the returns were made on that it would be entered on the books, and if we are put to that we will have to go through that entire matter.

72 Q. I will ask you, Mr. Wright, if you made a sale of a portion of those salmon to the firm of Warfield, Pratt, Howell and Company?

A. Yes sir.

(Plaintiff's exhibits 1 to 14 marked for identification.)

Q. I will ask you if you made any disposition of any of those fish to Brady & Pichot?

A. Yes sir.

(Plaintiff's exhibit 15 marked for identification.)

Q. Look at exhibit 1, which I hand you. I will ask you if you made any sale on that document?.

Mr. MCCORD: I object to that now for the reason it purports to be an order signed by Brady & Pichot somewhere in New York, is it not?

A. Seattle.

The COURT: The signature has not been identified.

Mr. BRUCE: That is the question I asked.

The COURT: I presume you had better proceed to further identify the paper before you show he did something in connection with it.

Mr. BRUCE: I propose to follow it up with the testimony of this witness that on this order he shipped the goods and got the money for it. I do not care whether that is a forged signature or not if we got the money.

The COURT: I think that would be true.

Mr. MCCORD: I object to any reference to the exhibit 1, for the reason it purports to be an order for so many cases of salmon, and there is no proof of the genuineness or validity of the signature and there is no proof of its being signed by the party whose name is attached to it. It is not sufficiently identified to be used for the basis on which to formulate a question such as that asked by counsel for the plaintiff.

The COURT: I presume if you are going to use this as the basis of a deal you had better show how he came to have it and what the transaction was.

73 Mr. BRUCE: We are trying to trace this sale through this paper. We expect to show that upon the receipt of this order it was filled the goods were shipped, the money returned at the price named in that order less the necessary expenses and it went to the credit of this account.

Mr. McCORD: I object on the ground it is incompetent, irrelevant, immaterial and not the best evidence to lay the foundation for the basis of a sale. This paper is unproven and unidentified.

The COURT: It is not offered now, he is just asking about it. This is merely for the purpose of directing his attention to the thing which he claims to have been done. If you are offering that paper that is a different proposition. This would be to merely call his attention to the thing you want to interrogate him about. I do not think any objection now is well taken. It is incumbent upon the plaintiff to show that it sold these goods at the market value of the goods at the time; that they made diligent efforts to prevent loss.

Mr. McCORD: I object to any evidence based upon that letter on the ground the letter is unidentified by anybody, that it is not properly proven by any authoritative evidence, and is secondary and hearsay.

The COURT: At this time the objection is overruled and denied.

(Last question read.)

Mr. McCORD: I object on the further ground that it is asking for a conclusion and not facts.

The COURT: Yes, to that extent the objection is sustained; you may amend your question.

Q. On receipt of that document what did you do?

A. Shipped 600 cases to Warfield, Pratt and Howell Company at Des Moines, Iowa.

Q. At what price?

74 A. Seventy-five cents per dozen.

Q. Were the goods paid for?

A. Yes sir.

Q. Look at what is marked plaintiff's identified exhibit 2, and state what you did upon receipt of that paper?

A. Shipped 100 cases to Allen & Lewis of Portland, at 75 cents.

Mr. McCORD: My objection to each one of these purported orders is the same. I object to the questions for the same reasons that I stated with regard to plaintiff's exhibit number 1, and I would like to have that same objection go to number 2.

Q. State whether or not those goods were paid for?

A. They were paid for.

Q. Look at plaintiff's identified exhibit 3, and state what you did upon receipt of that paper?

Mr. McCORD: The same objection as to exhibit 3.

The COURT: Over-ruled.

A. I shipped 100 cases to Allen & Lewis, of Portland, at 75 cents.

Q. I will ask you to state if that shipment was paid for?
A. Yes sir.
Q. Look at this document, plaintiff's exhibit number 4, which I hand you, and state what was done upon receipt of that paper?

Mr. McCord: At this time before counsel goes any further I desire to call the Court's attention to the present status of this case. The plaintiff has brought a suit against the defendants to recover $12,000.00 and some odd dollars, upon the breach of a contract. It is now manifest to the Court that it is necessary, really, for the Court to make an accounting between these parties: in order to determine the amount that is owing it is necessary for this jury to determine, first: the amount of the contract price, which is easily determinable, but to show what amount is going to be due to the plaintiff involves the necessity of the jury investigating 25 or 30 shipments of
75 salmon made at various times to various parties and various amounts, extending over a period of time beginning early in the year 1908 and extending to July, 1909, involving the gross amount, the discounts, commissions, expenses, the cost of transportation, and interest charges on varying amounts, involving partial payments, and it is a case, I think, that is not proper, under the decisions of our Supreme Court, for the jury to determine. It is proper at this stage to raise the objection that it is not an action for a jury, but it is an action for the court to determine. (Argument.)

The Court: There are two important matters that precede this accounting. Was there a contract and second, was there a breach of it. Those things are surely for the jury. The case might reach a stage where the Court would want to submit those two issues to the jury, and after that was decided by the Jury the Court might want to make an accounting, but it appears these are clearly questions for the jury and that they are precedent to the question of an accounting. (Argument.)

Mr. McCord: I now ask the Court for leave to amend my answer in which I shall pray the Court to take equitable recognizance of this action, to discharge the jury and proceed to try the case as a case in equity.

The Court: The offer and motion at this time will be denied.

Mr. McCord: I now move at this time that the Court take this case from the jury, that he discharge the jury and proceed with the case as an equitable accounting for the reason it is manifest from the present status of the case that at the time of the alleged breach of the contract for the sale of the goods in question that the plaintiff took back the goods and undertook to sell them for the benefit and for the account of the defendants, assuming the position in doing so of a trustee. It further appears from the evidence at this time that Mr.
76 Frank Wright has sold the goods to various and sundry parties scattered all over the country, and it is impossible at this time for the jury to reach any satisfactory conclusion as to the amount of recovery that the plaintiff is entitled to, if any. It is an action at this stage of the case, of equitable recognizance. It is one that the courts of equity have uniformly assumed jurisdiction in, and I move the Court at this time to take the case from the jury and

proceed with the accounting as an action in equity, so that the accounts between these parties, the amount of money realized from the sales of these goods to the various parties, may be investigated by the defendants, who have no opportunity at this time to enter upon an accounting, and determine the correctness thereof.

The COURT: The motion will be denied, and an exception noted to the defendants. If the defendants had desired a bill of particulars in regard to the money received, of course, they could have got it, and advised themselves in the matter.

Mr. MCCORD: I now move the court for a continuance of this case to give the defendants an opportunity at this time to investigate the various accounts of sales made by the plaintiff of the goods in controversy in this action, so that we may be able to produce testimony, if any exists, and have an opportunity to inquire into the proceeds of the sales of this salmon from these various parties.

The COURT: The motion will be denied and it is done so without prejudice.

(Whereupon the witness Mr. Frank Wright, was withdrawn temporarily to accommodate the witness R. A. Welsh, following.)

77 Mr. R. A. WELSH, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination by Mr. DOBE:

Q. What is your name?
A. R. A. Welsh.
Q. Where do you reside?
A. In Bellingham.
Q. How long have you resided in Bellingham?
A. Five years.
Q. What business have you been engaged in during that time?
A. Salmon canning.
Q. At Fair Haven or South Bellingham?
A. Yes sir.
Q. Are you still engaged in the same line of business?
A. Yes sir.
Q. Where do you get your fish?
A. In the various waters of Puget Sound.
Q. Do you know the fish that are commercially known as "pinks?"
A. I do.
Q. Is there any other common name for them?
A. Hump backs.
Q. Did you pack any of those fish in 1907?
A. Yes sir.
Q. Do you know the commercial terms of "flats" and "talls" as applied to cans?
A. Yes sir.
Q. What is meant by the term one pound flat pinks, as used commercially?
A. A can that holds one pound and is flat and contains hump backs or pink salmon.

Q. It is distinguished how from the "talls?"
78 A. By being flatter and of greater circumference.
Q. Did you pack any of that style of hump backs or pink salmon in 1907?
A. I did.

Mr. McCORD: I object as immaterial.
The COURT: Let him answer.

A. Yes, I did.
Q. You know what the opening price for that grade of fish was at that time?
A. I do. What time do you mean?
Q. For the 1907 pack?
A. Yes sir.
Q. What was it?

Mr. McCORD: I object unless you fix the time.

Q. When was that opening price made?
A. I do not remember.
Q. Approximately when?
A. I think it would be about the latter end of July or in September.
Mr. McCORD: How do you know there was an opening price made; do you know it of your knowledge.
A. No, I do not. It was told to me.
Q. Who told you?
A. Mr. Deming.
Q. What did he tell you it was?

Mr. McCORD: I object to the question on the ground it is immaterial. It is not shown that Mr. Welsh knows. He is testifying what Mr. Deming told him the opening price was.
The COURT: I do not understand that he has qualified as an expert yet.
Mr. DORR: He says the defendant told him what the price was. I do not think there is any use of qualifying him as an ex-
79 pert witness if he knows what the price was.
Mr. McCORD: I object on the ground he has not shown himself qualified. His testimony is merely hearsay.

Q. How is the opening price made, do you know?

Mr. McCORD: Of your own knowledge?

A. I have no knowledge how it was made.
Q. Generally, how is the opening price made?
A. I do not know. Supply and demand is all I can suggest.
Q. Who makes them?
A. The brokers.
Q. What brokers?

Mr. McCORD: I object unless the witness knows of his own knowledge how it was made.

A. I do not know how it was made; I take back the brokers.
Q. How do you know there is such a price?

A. I am told so by my brokers.
Q. Who are your brokers?
A. Deming-Gould Company.
Q. One of the defendants in this case?
A. Yes sir.
Q. What did they tell you the opening price was at the opening of the season of 1907?

Mr. McCORD: I object as immaterial. It does not seem to me it is admissible upon any theory of the case.
The COURT: The corporation could not tell him.

Q. What individual told you?
A. Mr. E. B. Deming.
Q. What did he tell you that price was?

Mr. McCORD: I object on the ground it is incompetent, irrelevant and immaterial. That might be used for impeachment if Mr. Deming had sworn what the price was or on rebuttal, and it
80 is not the best evidence. It is incompetent and not the best evidence.
The COURT: I have a question about it, Mr. Dorr.

Q. Did you sell any fish at that time, of this grade?
A. Deming-Gould sold my fish.
Q. Did they sell any for you?
A. Yes sir.
Q. Some of these flat pinks?
A. Yes sir.
Q. Who acted for the Deming-Gould Company?
A. Mr. E. B. Deming.
Q. You did your business with Mr. E. B. Deming?
A. Yes sir.
Q. At what price was your fish sold on the market at that time?

Mr. McCORD: I object as clearly incompetent, irrelevant and immaterial, and it is not the best evidence.
The COURT: I do not believe that is the way to prove it.

Q. Was the price you sold it at the prevailing price, do you know that?
A. I think I have always got the top price, I do not know.
Q. Was there a uniform price published and made public at that time?
A. What is the question?
Q. I asked you if there was a price that was generally understood in the trade to be the opening price that was made public?

Mr. McCORD: I object; what was understood is not proper here.
The COURT: If he knows he may say so.

A. I do not know what the balance of the trade considered, I know what I considered the opening prices.
Q. What was it?

Mr. McCORD: I object to the question as immaterial.

The COURT: Let him answer. It has been shown that he
81 is engaged in the manufacture and sale of canned fish.
(Question read.)

The COURT: I will sustain the objection to that.

Q. Do you say you know what the opening price was?
A. Yes sir.
Q. State what it was?

Mr. McCORD: I object to that because, your honor, he has already stated the only way he knew was from what his brokers told him. I object to the question as incompetent, irrelevant and immaterial. The witness has not shown himself qualified to answer,it is not the best evidence, and is hearsay.

The COURT: The objection is overruled.

Mr. McCORD: Let me ask a question. Did Mr. Deming ever tell you what the opening price was or what you could sell your fish for?

Mr. DORR: I object to that question as not being a preliminary question; it is cross examination.

The COURT: The objection is sustained.

Mr. McCORD: What did Mr. Deming tell you; you say you got your information from Mr. Deming?

Mr. DORR: I object as not being a preliminary question, as being cross-examination.

The COURT: Objection sustained. This is not proper now.

Mr. McCORD: Did you gain your information as to the opening price from any one individually or did you gain it from the public generally?

Mr. DORR: I object as not being proper at this time. Counsel has asked more preliminary questions now than he is entitled to.

The COURT: He may answer this question.

A. I gained my knowledge from one individual.
Mr. McCORD: Who was that individual?
A. Mr. Deming.

Mr. McCORD: From any other source?
82 A. I may have, but I did not pay any attention to it.

Mr. McCORD: Did Mr. Deming tell you what the opening price was or did he tell you what you could sell your fish for?

Mr. DORR: I object, that is the same question to which my objection was sustained before.

The COURT: Yes, I think so.

Examination resumed by Mr. DORR:

Q. State what the opening price was?

Mr. McCORD: I object as incompetent, irrelevant and immaterial The witness has not shown himself to be qualified.

The COURT: He is basing it upon information from one individual. I am inclined to concede it.

Q. How much fish did you sell?

A. Sixty-two thousand cases that year—I cannot answer.

Q. Approximately?

A. I packed 62,000 cases, but I did not sell it all that year.

Q. I am speaking with special reference to the one pound flat pinks?

A. How many I sold of them?

Q. Yes.

Mr. McCORD: I object as immaterial how many he sold.

The COURT: He may answer.

Q. That you sold during that season?

A. I do not remember.

Q. Approximately?

A. I think about 1000 cases.

Q. With reference to this question of opening price, was an opening price made on other grades as well as this one?

Mr. McCORD: I object as being immaterial, the witness has not shown himself qualified to answer.

The COURT: If he knows he may testify.

83 A. Yes.

Mr. McCORD: My inquiries were directed as to one grade of salmon; when you stated your information came from one individual, did you include as to sock eyes, flat pinks and tall pinks—was that your understanding?

A. Yes sir.

Q. I asked if there was a price made on all grades of salmon, and you have not been permitted to answer that.

The COURT: If it is the same proposition as the other, it will be the same ruling.

Q. Did you not hear this price any other way?

A. That is a very hard question for me to answer, and answer honestly and intelligently. We talk about things among ourselves, I do not care what the common talk on the street is. If I have something to sell, the man that sells that is the man whose word I take.

Q. I mean as applied to the trade—as limited to your—I want to know what your knowledge is of the general situation outside of your own business?

A. There is an opening price made on all grades of salmon.

Q. When is it made as to the packing season?

A. When the pack is pretty well determined for the season.

Q. That has been the custom for how long to your knowledge?

A. Five years.

Q. Here on Puget Sound, in Bellingham?

A. Yes sir.

Q. Do you know who the principal salmon brokers are that handle Puget Sound salmon?

A. I do.

Q. Who are they?

A. Deming & Gould Company.

Q. They are the largest brokers?

A. I think they are; I do not know them to be, but that is opinion.

Q. Do you know as a fact that they do make these prices and put em out from year to year?

A. They emanate from Deming-Gould Company, but how they it I do not know.

Q. Those prices that emanate from Deming-Gould Company go to the Public, do they not?

A. I presume so.

Q. Do you know whether there are circulars issued as to the ces?

A. I do.

Q. What are the facts about that?

A. Circulars are issued.

Q. Announcing the prices?

A. They are not signed.

Q. They do not bear a signature?

A. No.

Q. There is a printed signature, is there not?

A. Yes sir.

Q. Whose signature is that?

A. Deming & Gould Company.

Q. And that is the custom from year to year?

A. I have not seen them every year, but I have one or two.

Q. Now, speaking generally can you tell what the opening price in 1907 on pink one pound flats?

Mr. McCord: I object on the ground the witness is not shown to qualified. He admitted he derived his entire knowledge from own broker, the information which he communicated to the wit-, as to the price of salmon.

The Court: I did not so understand it. I understood him to say there was talk among the manufacturers about these things.

Mr. McCord: What is the source of your information from year ear as to the opening prices of salmon?

Mr. Dorr: I object to counsel cross examining the witness at this .

Mr. McCord: I have a right to cross examine him, you are quali- g him as an expert.

he Court: I think the witness should be allowed to give his mony and you can cross examine him to determine the weight is testimony. I believe he has passed the point where prelim- y questions are proper in this case. You may answer the ques- (Exception allowed the defendants.)

Ninety cents a dozen.

Cross-examination of Mr. R. A. WELSH by Mr. MCCORD:

Q. Did you sell any goods about the time the opening prices were fixed for less than the opening prices for the year 1907?

Mr. DORR: I object as incompetent, irrelevant and immaterial and not proper cross examination. We were only trying to get the information as to what the opening price was.

Q. And wasn't salmon sold for less than the so-called opening price.

Mr. DORR: The same objection.

The COURT: I would be inclined to allow this question to determine what the opening price was if you direct your question to these same salmon, one pound flat pinks.

Q. Directing your attention to one pound flat pinks, or hump backs, I will ask you to state if salmon were not sold about the time of the opening prices and at other times for a good deal less than the opening prices by the public generally?

A. I cannot answer generally. I sold salmon for considerably less than 90 cents per dozen at that time.

86 Redirect examination of Mr. R. A. WELSH by Mr. DORR:.

Q. You mean to say you cut the price, or was this sale made before the price was established?

A. I didn't cut the prices, the 90 cents a dozen was a supposed price and I doubt if any salesman got 90 cents. I didn't. I never saw conclusive proof that any was sold at 90 cents.

Q. You did not sell any at 90 cents?

A. No sir.

Q. What price did you get?

A. Eighty and 75 and the next year 60.

Q. You are testifying as to one pound flats?

A. Yes sir.

Q. What did you get for talls?

A. Seventy-five cents.

Q. And you say that you cut the price then?

A. Yes, sir. I cut the price if you like it that way.

Mr. MCCORD: I move to strike out the last part of the answer as not responsive. It is immaterial in any event and I move to strike it.

The COURT: Let it stand.

(Whereupon the witness was excused and left the stand.)

Mr. FRANK WRIGHT, resuming the stand, testified as follows:

Direct examination by Mr. BRUCE:

Q. Look at exhibit 4, state whether you shipped any goods upon that paper?

A. Yes sir.

Q. To whom did you ship those goods?

A. Stewart Gwynn & Company.

Mr. McCORD: I object to any interrogatories on exhibit 4
87 on the grounds heretofore stated, as being incompetent, irrelevant and immaterial. The document to which the witness's attention is directed is not identified as being sent from anybody, the signature is not proven, the document is simply a stray brought into court as the basis for the foundation of proving the sale of goods.

The COURT: I understand this is an identified exhibit and the witness's attention is directed to it now for the purpose of refreshing his memory as to parties with whom he had transacted business. The objection is overruled.

Mr. McCORD: And I make the further objection that I made to plaintiff's identified exhibits 1, 2 and 3.

The COURT: The objection is overruled.

Q. At what price were those goods shipped?

A. Seventy-five cents.

Q. I will ask you to state whether they were paid for?

A. Yes sir.

Q. Look at Plaintiff's identified exhibit 5 and state whether you sold any goods on that order?

A. Yes sir.

Mr. McCORD: The same objections as to number 5.

The COURT: The objection is overruled.

Q. To whom?

A. To J. R. Grant & Company, Seattle, 175 cases of pink salmon at 75 cents.

Q. Were those goods paid for?

A. Yes sir.

Q. I will now ask you if you made a disposition of all the 10,903 cases of pink fish between the 2nd day of July, 1908, and the commencement of this suit?

A. Yes sir.

88 Q. And I will ask you to state if those fish were sold upon the best obtainable market at that time?

Mr. McCORD: I object to the question on the ground it is leading and suggestive.

The COURT: You might ask how they were sold, and bring out the facts.

Mr. McCORD: And I object further upon the ground that the witness has not been shown to be qualified to determine what the market price was or what the best obtainable price was.

The COURT: I think he is qualified. You can test him on your cross examination. He may answer the question.

A. The goods were sold at the best prices obtainable at the time of the sales.

Q. Do you know the gross amount at which the goods were sold by you?

A. Yes sir.

Q. Have you made a computation of that?

A. Yes sir.

Q. Look at the paper which I now hand you, for the purpose of refreshing your memory only, and state what the gross amount of sales——

Mr. McCORD: I object to the witness refreshing his memory from any memoranda such as he holds in his hands, which shows that it was made up after the commencement of this suit, made up by an expert bookkeeper probably; at least not by this witness, and it is not a proper document from which to refresh his memory in answering that question.

The COURT: If he has knowledge of the transactions and has verified the computations, I do not care whether he made it out himself.

Q. I will ask you whether you informed yourself from your personal knowledge and have you a statement, or from this state-
89 ment, can you tell what the facts are after your memory is refreshed by this statement?

A. Yes sir.

Mr. McCORD: I object to the question. I object to the witness refreshing his memory from the alleged statement on the ground it is not properly identified, and is not shown to have been made from any data in his possession. It shows that it was made up from books at various times and made since the commencement of this action.

The COURT: I understood the witness to say he had verified the items in this statement, if that is correct, and I will ask if I am — in that statement. If you desire to cross examine him touching these matters you will have that privilege, but if he handled these matters, these sales, made the sales, had personal knowledge of them and he has checked up what is now a summary or statement of those alleged transactions I will permit him to come down to the summary.

Mr. McCORD: I object on the further ground this is not the best evidence. No loss of the original evidence has been shown. He can produce the original documents.

The COURT: If you want them you will be permitted to have them. He testified he made these sales and made up the figures of them.

Mr. McCORD: I now ask the witness to produce those original accounts.

Mr. BRUCE: Here they are. (Indicating books.) Help yourself.

Mr. DORR: With the concurrence of Brother Bruce I will ask permission at this time to have this witness step aside temporarily and have Mr. Byrne take the stand, the gentleman who made these figures up, and tell how it was done.

The COURT: If you can save time that is what I am after.

(Whereupon the witness Frank Wright was withdrawn for Mr. Byrne.)

90 Mr. L. P. BYRNE, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination by Mr. BRUCE:

Q. Where do you reside?
A. In Bellingham.
Q. How long have you lived in Bellingham?
A. Practically 20 years.
Q. What is your business?
A. At present I am in the business of manufacturing lumber.
Q. When did you become a manufacturer of lumber?
A. The fore part of this year.
Q. What was your business prior to that time?
A. I was secretary of the Shingle Manufacturers' Bureau.
Q. How long were you secretary of the Shingle Manufacturers' Bureau?
A. About six months.
Q. Prior to that time what was your business?
A. Bookkeeper.
Q. Where?
A. For the Bellingham Bay Lumber Company.
Q. How long did you follow the vocation of bookkeeper?
A. For the Bellingham Bay Lumber Company for about 4 years.
Q. What did you do prior to that time?
A. I was a bookkeeper.
Q. For whom?
A. For the Whatcom County Railway and Light Company for 4 months.
Q. How long were you all together following the pursuit of bookkeeper?
A. Most of the last 20 years.
Q. Where did you acquire your knowledge eping?
A. In the business college.
Q. At what place?
91 A. At Larnard, Kansas.
Q. And you took a full course in bookkeeping at Larnard, Kansas?
A. No, a very short course.
Q. Following that you took up the business of bookkeeping?
A. Yes sir.
Q. And you followed that business for how long?
A. The best part of the last 20 years.
Q. And how many sets of books have you worked upon or kept?
A. That would be pretty hard to answer.
Q. Has it been a great many?
A. A good many.
Q. Are you familiar with business bookkeeping and understand the method of opening and keeping books?
A. Yes sir.
Q. And you understand the method of making an examination, of taking a set of books and going over them for the purpose of de-

termining and finding out what the books show; the condition they are in?

A. Yes sir.

Q. I will ask you to state whether or not you have ever examined the books of the Carlisle Packing Company with reference to the pack of salmon made by that company for 1907?

A. Yes, partially.

Q. And I will ask you if you made an examination of the books for the purpose of determining the disposition of 10,903 cases of pink flats of the pack of 1907, showing the disposition made of such fish?

A. Yes.

Q. I will ask if you have made an examination of the books and accounts of that company for the purpose of ascertaining the amount of money which was paid to it, and the various dates of pay-

92 ment by E. B. Deming or Deming-Gould Company or the Pacific American Fisheries, respecting the pack of 1907, with a view of getting at the interest charges which would accrue on deferred payments?

A. Yes sir, I checked over those things.

Q. I will ask you if you made a tabulated statement from the books showing the condition of the various things about which I have interrogated you?

A. I cannot say that I made it.

Q. I will ask you if you have seen such a compilation?

A. Yes sir.

Q. And have you checked it over and verified it with the books and vouchers?

A. I did.

Q. I hand you a paper which I hold in my hand and disregarding the pencil marks, and which I will have identified as plaintiff's exhibit 16, and say whether it is the document about which we have been talking?

A. Yes sir.

(Plaintiff's exhibit 16 marked for identification.)

Q. How did you check that, just state to the jury the method?

A. I had the books laid before me, and some papers, letters, memoranda and another statement similar to this one, but not arranged exactly in the same way; the dates were arranged in a different method—more mixed up. I re-arranged that, went through the books and memoranda and satisfied myself that this amount of salmon had been paid for at these prices; had been sold to different people and the money received in these amounts of money, less these discounts and commissions. (Indicating on exhibit 16).

Q. This statement shows the sale of 10,909 cases of flat pink salmon; in the first column here it shows the date of sale or order?

A. The shipment date as near as we could arrive at it.

93 Q. And the second?

A. The date of return, the date the money was realized. In some cases the agent would sell the goods, the broker or consignee

—I couldn't tell exactly from my knowledge whether it was the consignee who was going to use the stuff or whether it was sent to him as agent.

Q. But the charge was made?

A. The charge was made.

Q. That represents the purchaser or consignee?

A. I could not say, it was the consignee or the purchaser.

Q. You put that under the word consignee?

A. That is supposed to be the purchaser.

Q. Under the word address?

A. That might be the address of the man who ordered, the agent, or it might be the address of the destination of the shipment.

Q. That is the destination of the shipment?

A. That is supposed to be.

Q. What does the next column show?

A. The number of cases.

Q. Under the word price, what does that indicate?

A. The price per dozen received for the fish, the gross price the fish sold at.

Q. And what does this show? (indicating on exhibit.)

A. That is the total of that number of dozen cans sold.

Q. Under the word discount, what does that mean?

A. That is the cash discount.

Q. Do you know what that was?

A. One and a half per cent, it figures out.

Q. What is this under the word commission?

A. The commission paid.

Q. Figured on what basis?

94 A. It is figured on a 5% basis.

Q. Under the word exchange, what does that mean?

A. That was the bank charges for collecting the money.

Q. Back here, gross amount, what does that mean?

A. That is the total of that number of dozen cans sold, for that much money.

Q. Under the word net amount?

A. That would be the net balance received from the sale of the fish.

Q. You verified those figures back and found them correct?

A. I checked them carefully.

Q. Turning over to this next page to this statement of interest on contract value of 10,914 cases of flat pink salmon, state what you have there, that shows what?

A. That shows the amount due—being the total of—the next item I checked was the contract for so many cases of fish at a certain price less some swells.

Q. How many cases——

A. Ten thousand nine hundred and twenty cases according to the records, 6 cases of swells, which is some term in the packing business I am not familiar with, leaves 10,914 cases, that leaves so many dozen at the price of 90 cents. There was a label allowance for unlabeled fish at 65 cents per thousand, deducted.

Mr. McCORD: I object to the witness testifying and reading into the record this report, until the report itself is admitted in evidence.

The COURT: Yes, I think so.

Q. That shows the statement of the difference between the quantity of fish there mentioned at one price and at another price?

A. Yes sir, it shows the difference between the one price and the price which was realized from it.

Q. Taking that price realized from the goods, it carries back here to the two pages we have passed for the purpose of getting
95 at this computation?

A. No sir—it does in a way in these amounts. The amounts of cash received.

Q. Taking the amount of fish computed at 90 cents that aggregates what?

Mr. McCORD: I object to that, he says he made up this report—

Q. And this shows that?

A. That is a statement of interest on salmon sales to Deming-Gould Company.

Q. Now that is upon sales made, or from what dates, rather, is that computation made?

A. The first shipment here shown is October 4, 1907.

Q. This shows the amount——

A. The amount of payments received.

Q. The last column shows interest——

A. Interest on sales computed at the rate of 8%.

Mr. DORR: Up to what date, please?

A. September 16, 1909.

Mr. BRUCE: I now offer this statement in evidence, plaintiff's identified exhibit 16.

Mr. McCORD: I object to it on the ground it is incompetent, irrelevant and immaterial, and on the ground the witness has not shown himself qualified as an expert to determine the condition of the books, but particularly do I object to it on the ground that he never made it up himself. He says he checked over this statement prepared by somebody else with books, letters, memoranda and various and sundry items that were exhibited to him at the Carlisle Packing Company's place of business. It is a statement which purports to be made up from books, records, papers, memoranda, letters and containing parts of these. Nothing is shown as to the correctness of the memoranda and books from which the statement purports to have been made.

96 The COURT: All these matters are here, the books and documents?

Mr. BRUCE: Yes sir.

The COURT: If there is any question about it, you may show where these figures came from, as to cases shipped, prices received; if there is any question about those appearing on the books that may be determined now. I thought those documents were used for checking up names, places and dates, and I thought that Mr.

Byrne got these items from the books, bbut if there is any question about that you can settle that now.

Mr. DORR: As to the things that are on this statement we understand they are all on the books.

The COURT: You may test the witness on that and remove any question, there may be room for some question on that.

Mr. DORR: With three small exceptions, I think that these billings were made through the First National Bank of Bellingham and drafts were drawn, and we intend to follow this up by evidence from the bank to show the proceeds received from these drafts on these sales and they will check with that statement.

The COURT: The ruling on this offer will be reserved at this time.

Q. You worked with whom on the compilation of this statement?

A. With Mr. L. O. Waldo.

Q. And the various vouchers, letters et cetera you have alluded to were checked for the purpose of determining whether the amounts shown upon the books were correct?

A. I did not quite get that question.

Q. You verified the correctness of the books from the vouchers which you checked with your account, is that what I understand you to say?

Mr. MCCORD: I object to the question as being leading, and suggestive. He says he checked the statement furnished him by the books and memoranda, now he asks if he did not check the books by certain vouchers.

97 The COURT: Just tell what you did.

A. I took this statement which was furnished me and checked it with the books and memoranda and some shipping bills and orders, to satisfy myself it was correct as far as the amounts, dates and names went.

Q. Did you check the returns from the bank on connection with the other matters?

A. Not the bank book; I did not see the bank book. I saw a memorandum that was supposed to be furnished by the bank, showing the dates of the collections.

Q. You had a memorandum from the bank, made by the bank, but whether or not that was correct you do not know?

A. I have no way of knowing, no sir.

Q. From the work which you did and the investigation you made, state whether the tabulated statement there is correct, and state the correct conditions with regard to what it purports to show?

Mr. MCCORD: I object as asking for the result, not what he saw in the books. He says he simply investigated to satisfy himself as to the correctness of these amounts. We are entitled to know the source from which he made it up.

Mr. DORR: They are right there before you. The bank book is not here, but that will be proven by the bank officers. The orders for goods that were in writing are there.

The COURT: I will ask one question myself in this connection.

Where did you get the figures you have there showing the amount of goods sold, the price at which they were sold, the aggregate amount which they brought and the returns after taking out the commissions and charges, et cetera where did you get the figures?

A. I got them from this statement. I was checking over the statement and re-arranging it.

The COURT: When you went back and checked it over did
98 you find it in the books?

A. Yes sir.

The COURT: Did you get your figures from the books of the company and check it finally?

A. Yes sir.

The COURT: If that is not full enough take it up from there. I will reserve the ruling on the offer. I wanted that for my own information and the information of the jury.

Mr. McCORD: I would rather reserve my cross-examination until the offer is made. Do you want me to cross-examine this witness now on these matters, your Honor?

The COURT: Yes.

Cross-examination of Mr. L. P. BYRNE by Mr. McCORD:

Q. This statement is in the same form now that it was, or was it handed to you by Mr. Waldo; did he prepare the statement in the first place?

A. Yes sir, not exactly in the same form.

Q. He furnished you a statement but it was not arranged in exactly this way, but with the information, the names, addresses, prices, discounts and commissions all given and figured out, and submitted it to you?

A. Yes sir.

Q. And you took it up and figured each one over again?

A. Yes sir.

Q. Take for instance this item, 50 cases, just tell what you did with that, how you reached that?

A. If I remember right——

Q. I want you to tell me how you did it; what did you do, tell the Court what you did?

A. I looked up the correspondence.

Q. Looked up what correspondence?

99 A. That furnished me by Mr. Waldo and the books.

Q. That is the correspondence that was introduced here?

A. The books and ledger, and I found a charge was made to this party on or about this date for so many cases of salmon at a certain price, amounting to so much, no discount or commission had been paid on that item, $127.50.

Q. You say you got that from the ledger and certain correspondence?

A. Yes sir, and the records?

Q. What do you mean by records?

A. Memoranda.

Q. Just little memoranda stuck on the pin on the desk?

A. No, I would not say that.

Q. How were they kept?

A. In that particular case, I could not say. I do not *not* remember just now.

Q. How were they kept generally; you talk about memoranda, tell what you mean by memoranda.

A. Shipping bills, orders and copies of invoices and a little red book with shipping dates in it, so many cases sold to so and so shipped——

Q. And you checked up the ledger and these memoranda?

A. As well as I could.

Q. Did you go through the journal and day book, or just the ledger?

A. The ledger and the journal.

Q. Did you go through the day book, the book of original entry?

A. They had no day book, the journal in that case was the book of original entry.

Q. Did they have any books but the journal and ledger?

A. They had what they called a memorandum book or order book, dates of orders, consignee and number of cases, so many cases shipped on a certain date to a certain party.

100 Q. In making up this record you took into consideration the orders that you found for the salmon, and based your figures on that order?

A. In some cases, yes.

Q. And you, of course, assumed those orders were authori-tive and signed by the proper party?

A. Yes sir, not knowing otherwise. I took them just as they showed.

Q. As a matter of fact, did you not in getting at those figures just check them over and find so much salmon was shipped out, but did not verify the net amount where the computation did not make his figures and in the computation of interest did you not take his figures?

A. No sir.

Q. Did you verify every one?

A. Yes sir.

Q. Just take the item of 600 cases of salmon, have you got the data here that shows that, the data from which you made it up, that particular item, the one July 22, to August 10, Warfield, Pratt & Howell Company, Des Moines, 600 cases, just show me in the books from where you made up that item; you are familiar with them are you not? (witness examines books) Start in at the beginning of that investigation and show me how you did it?

A. That one particular item you call my attention to?

Q. Yes. What is it you are figuring on now?

A. This is a memorandum, purporting to be a memorandum from the bank of the collections made on certain dates, and a memorandum of it.

Q. You had that memorandum before you?

A. Yes sir.

Q. And it was necessary for you to have that memorandum before you?

A. Yes sir.

Mr. McCORD: I submit at this stage of the proceedings the
101 evidence is not proper. They are undertaking to introduce in evidence a statement purporting to have been made up from books and yet this witness says in order to make up this statement it was necessary for him to use this kind of memoranda.

The COURT: The court is not passing on the offer.

Mr. DORR: I have already stated that we intended to show the returns from the bank's records. The witness has a memorandum which he says was furnished him, but we intend to prove that by the bank's officers.

Q. You had to use that memorandum furnished by the bank before you could make up that statement?

A. I do not know that I had to, but that was the method I used; the statement probably could be made up without that.

Q. I want to know whether you can tell me—can you get the information contained there without that?

A. I could not say that because I did not go into the books thoroughly enough to say.

Q. Which is correct, the memorandum or the books, or both?

A. I cannot say any of them are.

Q. You never checked up the books with the vouchers?

A. No sir.

Q. There was no voucher system kept there?

A. No sir.

Q. You got it from the books?

A. Yes sir.

Q. And you could not make up this statement without having the assistance of the bank's books?

A. I might be able to.

Q. I would like you to, between now and morning, find out whether you could or not, and I would like to have you show me whether you could make up the statement of this account.
102 particularly that account, and others I want to ask about. I want to know whether these books correctly show that item, themselves, or whether you had to go outside to get the information. Now, did you examine the expense account of these separate sales or that particular sale, or do you recall?

A. What do you call the expense account?

Q. I mean where you sold for so much money and a draft was drawn was it drawn for the freight and the price of the salmon; who paid the freight?

A. The consignee, I understand, paid the freight.

Q. I do not want to know what you understand; is there anything on the books to show that?

A. I did not check up the freight account.

Q. Can you turn to the freight account and find out, now, for me?
A. If there is a freight account, I could probably find it.
Q. Are you able to tell from the books about this freight; I want to know whether they paid any transportation?

Mr. DORR: If we have paid any transportation, we have not charged it to this account.

Mr. BRUCE: We charged this account with the 1½ and 5% commission.

Mr. McCORD: You are not testifying, you and Mr. Door.

The COURT: Is there no freight shown on the statement?
A. No, there is no freight shown there.

Mr. McCORD: I do not know whether the freight was taken into consideration in the purchase price or whether the other fellow paid it.

Q. Now, I see an item for 75 cents per dozen, $1800, $27 discount, and so on. I wish you would show me the memorandum with which you say you checked that up, or did you rely entirely upon the books?
A. I started to do that a moment ago. I had the memorandum which was furnished by the bank.
103 Q. Furnished by the bank?
A. It is supposed to be in the bank's handwriting. It was furnished to me by Captain Waldo, and shows there in that item that on July 22, supposing that to be the approximate date of shipment, Warfield, Pratt & Howell Company of Des Moines, $1773, were received by the bank on August 10th, the gross amount, $2700, discount that for $27, that would be $1773.
Q. Where is the interest charge and commission?
A. The commission charge was made up here on this part, $88.65.
Q. Where did that item come from?
A. I do not know. I took it from the books just as they are.
Q. Were you able to find a voucher for that?
A. I do not know.
Q. I would like for you to examine that bunch of papers that they say contains the return of every sale and show how they got that from the books?
A. I do not know whether that is there
Q. I will hand you the bunch. (Hands witness plaintiff's identified exhibits from 1 to 15.) Did you examine the voucher for $88. commission?
A. No sir. I took the books and made the statement up from here (indicating) I got that item from here. (indicating journal.)
Q. Was that the book of original entry?
A. It would be in that case.
Q. Was that the first entry made?
A. I do not know.
Q. You did not look far enough behind it to see?
A. No sir.
Q. Did you try to find a voucher for it?
A. No sir.

Q. Do the books show who it was paid to?

104 A. Yes sir, the books show who is credited with it.

Q. Who is it?

A. Brady & Pichot, they were the commission men or brokers.

Q. They were the commission men?

A. They were the consignees.

Q. What do the books show in regard to that matter?

A. They show that Brady & Pichot had a credit for $88.65 commission on that sale.

Q. Did you look up the receipt from Brady & Pinchot on that matter?

A. No sir.

Mr. McCORD: I will ask counsel if they have the voucher for that here?

Mr DOER: These commission charges are usually deducted from the invoice. I do not know about this particular instance, but as a general rule it is deducted. Supposing that Griffith-Durney Company of San Francisco, sent in an order, 1½ and 5% is deducted from that and a draft is drawn on them, and that is rebilled to the consignee, the buyer. We do not have any voucher for it. In some instances, probably with Brady & Pichot, they have a commission account, and that is all that is shown. Whether we have the voucher for the payment of that commission, I do not know but I do not think it is material, if we owe it and have not paid it, it is immaterial.

Mr. McCORD: I demand that they produce the vouchers for every item of commission that has been charged here, aggregating $1503.87, and discounts of $453.05.

Q. Now, I would ask you if that does not show that 600 cases, that same item, at 75 cents per dozen, that would be $3. a case would it?

A. I believe there are 4 dozen in a case.

Q. That would be $3.?

A. Yes sir.

105 Q. And 600 cases would make how many dozens?

A. Eighteen hundred.

Q. And the money remitted to Mr. Purdy's bank is shown by that statement as how much?

A. Seventeen hundred and seventy-three dollars.

Q. Less the $27. deducted, that was for the cash discount, amounting to $27?

A. Yes sir.

Q. So it shows that the goods were sold at $3. a case or for the sum of $1800?

A. Yes sir.

Q. And was all that $1800 remitted to the Carlisle Packing Company and they got all of it except the $27 discount?

A. That is what it shows. There was later a charge of $1.80 that probably came in at the end someway.

Q. There is nothing you have seen that shows that $88.65 commission was ever paid out by this company?

A. Only there is a credit to Brady & Pinchot for that amount.

Q. But, it shows that the purchasers remitted to the first National Bank and this company got the credit for the whole of the purchase price without the commission?

A. No, they would have to pay this commission.

Q. They remitted to them direct, this Carlisle Packing Company got the money for the whole $1800, less the 1½%.

A. Yes sir.

Q. I will ask you to take up the next item showing a commission of $14.77, the item of Allen & Lewis, and see what became of that?

A. Here is the discount on that, $19.27, which is credited to Brady & Pichot, discount and commission, they were credited there.

Q. What do the bank's books show as to that?

A. The bank's memorandum says $300, paid, this is not the bank book.

106 Q. The bank got credit for 100 cases at $3. per case would be $300 and this company received a credit for how much money, for the full $300, didn't it?

A. I do not know; this memorandum says $300, was paid July 27th.

Q. Does it show that any of it was deducted on the draft?

A. No, Brady & Pichot have a credit for commission and discount.

Mr. McCord: I do not want to appear to be demanding anything that is unreasonable, but counsel should produce those vouchers. They have undertaken to sell our goods on our account, and I demand that they produce the vouchers for the money that they say they expended if they have them. I want to know what they are. The vouchers for money paid out, for commissions and for these discounts and for all other expenses—I want the original papers and I demand that they produce them here.

The Court: You can make the demand on them for any papers you want. I think you should make a demand for a bill of particulars.

Mr. McCord: I want the witness here for further cross examination but I do not care to go on with it until Mr. Wright testifies.

Redirect examination of Mr. L. P. Byrne by Mr. Bruce:

Q. These items about which Mr. McCord has been interrogating you you spoke of a commission account being credited over to Brady & Pichot?

A. Yes sir.

Q. That shows a commission of 5% on the sale of each item about which you were interrogated?

A. Yes sir several of them.

Q. Taking the total here and running each item back you find it shows 5% commission on some of these sales?

A. Yes sir.

Q. And this is merely the aggregate which amounted to $112.47 at that time?

107 A. Yes sir.

Q. Which takes each item separately as shown by the sales account here and credits them with 5%?

A. Yes sir, all those various items.

Q. Checking back over those several items here, credited with commissions, you found that the sale proceeded upon one of these orders, did you not?

Mr. McCORD: I object as not being a proper question.

Mr. BRUCE: I withdraw the question.

Q. Take the Warfield, Pratt Howell Company account as illustrated you found that on the 600 cases shipped there was $1800 received?

A. Yes sir. That was the gross amount.

Q. And 1½% discount was allowed by the bank?

A. Yes sir.

Q. And a matter of $88.65 was credited to Brady & Pichot as the brokerage account?

A. Yes sir.

Q. And subsequently a charge came on for $1.80?

A. Yes sir.

Q. And deducting $27. and $1.80 left the net amount of $1682.55 which was all the money received by the Carlisle Packing Company?

A. Yes sir.

Q. After it had received $1773. it immediately charged itself with the $88.65 commission?

A. Yes sir.

Q. And that was the way each one of those items were figured out?

A. Yes sir.

Recross-examination of Mr. L. P. BYRNE by Mr. McCORD:

Q. Show me in that book where they remitted, or paid that; did you find any place where they paid this $88.65 to Brady & Pichot or is there anything on the books to show they paid it out?

108 Mr. BRUCE: We object to that as immaterial and not proper recross examination. If they owe it and are chargeable with it, it would be the same.

Q. I will ask if you have found where they paid that $88.?

The COURT: I think I will let him answer that.

A. It is probably offset by other items.

Q. Before you get on that——

Mr. DORR: We would like to have him do it while he is on it. We would like to show up that Brady & Pichot account.

A. Four hundred and twelve and forty-seven cents is the total of that credit; later on they are credited with other amounts, they are charged with 3 different checks.

Q. What is the date of that check, the charge of $88.65, when was that entry made?

A. That entry was made August 31st.

Q. What year?

A. In 1908 from appearance, that would be July, 1908, August 31, 1908 that credit was made.

Q. August, 1908?

A. August 31st, credited with $412.47, September 16th charged with a check of $262.47.

Q. Have you got any memorandum you can use and find out what that item covered, that $262.47 check?

A. No sir.

Q. Is it shown in the books anywhere; you have experted these books?

A. I have not experted these books. There is an entry in the cash book, September 16th, Brady & Pichot charged with $262.47, it says commissions on 1907 pack.

Q. What individual items made up that?

A. I can not tell.

109 Q. Is there anything in the books showing it?

A. I do not know.

Q. If there is, I wish you would turn to it?

A. I would not know where to turn to find any memorandum.

Q. Did you ever see any such memorandum?

A. No.

Q. So you never verified any memorandum that was exhibited to you to show that $88 was paid to Brady, Pichot & Company?

A. No sir.

(Whereupon the court adjourned until the hour of 9:30 on the following day, at which time court opened pursuant to adjournment, all parties being present as first herein mentioned, counsel having conceeded the jury present, the trial was resumed.)

Mr. L. P. BYRNE, taking the stand as per adjournment, by consent of counsel the re-direct examination is resumed.

Redirect examination by Mr. DOBB:

Q. On yesterday you were asked by counsel for the defendant- if there was any evidence that you had inspected or examined to prove the payment of Brady & Pichot's commission account, if the books showed they had been paid in cash or checks. I will ask you if since that time you have made an examination of any checks referring to that account or charged on the books?

A. I have.

Q. Have you those checks here?

A. I believe they are in the records. (Witness produces papers.)

Q. Will you first please turn to the sales account you had yesterday where it shows a charge for broker's commissions on the sale itself?

A. Yes, I have it here.

Q. Show just how that is entered on that book?

Mr. McCord: I object to his testifying to that because there
110 is no proof yet—the book is not in evidence; the witness has no right to read from the book; the book has not been introduced in evidence and he is not entitled to read from the book itself.

Mr. Dorr: My recollection is that it was offered and admitted yesterday under Mr. Wright's testimony that they had been kept under his control.

Mr. McCord: They were offered, but they were not admitted by the Court, and the offer was not pressed after my objection.

Mr. Dorr: I thought the books were admitted, but this statement was not.

Mr. McCord: Before they are admitted I want to find out whether the books were properly kept.

The Court: I do not remember that the books were admitted. The proposition came up for their admission as a whole and it was suggested that only the parts of them pertaining to this matter ought to go in, and I do not think the matter was disposed of further; that is my recollecion.

Q. With reference to the account Mr. McCord was asking you about yesterday, which is the basis of this entry or the statement as far as the commission is concerned, where do you find that on the books in the first place?

A. In the ledger.

Q. In what shape is it entered there?

Mr. McCord: I object to the question until you first identify the books and put them in evidence, so we may know what is before the Court. Mr. Wright says the books were kept under his direction, but I think I am safe in making the statement that he does not know anything about bookkeeping, and before he can say those books are correct we should have the chance to examine Mr. Wright to know whether they were properly kept.

The Court: This matter will be reserved by the Court
111 until this matter has been gone into. I will let the witness proceed assuming the books are correct, and then the admission of both of them will depend upon the books, and I think with that understanding I will let him answer. (Exception allowed the defendants.)

Q. How was it entered in the ledger?

A. It is entered in the form of a credit to the account of Brady & Pichot, referring to date.

Mr. McCord: I object to that question on the ground that is not a book of original entry.

The Court: Let the witness trace it to the original entry if that is not the original entry.

Q. How is it entered in the book of original entry, wherever that book is?

A. This journal I would take to be the book of original entry.

Mr. McCord: Do you know whether it is a book of original entry of your own knowledge?

A. No sir.

Mr. McCord: Then, I suggest that it is not proper. I object to the question.

Q. Is that the first book you found in the series that contains the entry?

A. Yes sir.

Mr. McCord: I object to counsel's undertaking to prove those books by this witness. It is manifest from the examination that this witness went there and took out the entries that were pointed out to him; he knows nothing about the books authentically.

The Court: If there is any question about this I will let the witness be withdrawn and let you examine Mr. Wright to find out whether they are authentic.

(Whereupon the witness L. P. Bryne was withdrawn for Mr. Wright.)

112 Mr. Frank Wright, being recalled to resume his direct examination testified as follows:

Direct examination by Mr. Dorr:

Q. Referring to the books that are here before you, I will ask you what those are, if you know?

Mr. McCord: I object to the question as calling for a conclusion of the witness. I object to it because he is not a bookkeeper and I do not think he is competent to testify as to what the books are.

The Court: He knows whether they are the books of that company; he ought to know whether they are his books or not.

Mr. McCord: Whether they are the books or not ought to be shown by the man who kept them, or someone who can testify as to what those books are.

The Court: He testified about this yesterday.

Mr. McCord: I want to ask a few preliminary questions.

The Court: The objection to those questions will be overruled. You will be permitted to cross examine him afterwards.

A. Carlisle Packing Company's books.

Q. Don those books cover the original entries in this transaction?

Mr. McCord: I object to the question as leading. He can tell what the books are if he is competent to testify.

The Court: If he knows he can tell.

A. They are the Carlisle Packing Company's books for 1907 and 1908 and contain all of the entries of this flat pink salmon transaction.

Q. Do they contain all the entries of the salmon that is involved in this litigation?

A. Yes sir.

Q. Where have these books been since that time?

A. With the Carlisle Packing Company; they have been in the safe most of the time, and after the safe got full we had to

113 take them out and shelve them and put the 1909 books in the safe.

Q. Where has the office been during all of this time?

A. At Village Point, Lummi Island.

Q. Is that at the cannery?

A. Yes sir, at the cannery.

Q. And when were these books brought away from the cannery?

A. About 3 or 4 days ago.

Q. For the purposes of this trial?

A. Yes sir, about a week ago.

Q. Who made the entries in these books?

A. There were two men who made the entries, one was Mr. Frisbie and the other was Mr. Woods.

Q. Under whose direction were these books kept?

Mr. McCORD: I object to the question as being immaterial, incompetent and irrelevant, as far as identifying the books and showing the books were properly kept is concerned. If Mr. Wright was the president of the Carlisle Packing Company it is presumed that they were kept under his general direction.

The COURT: He may answer.

A. They were kept under my direction.

Q. How long have you been manager of the Carlisle Packing Company?

A. Since 1902.

Q. Are these bookkeepers, either of them, in the employ of the company at the present time?

A. No.

Q. What, if anything, did you do in the way of giving directions to anyone to make up this statement, referring to plaintiff's identified exhibit 16?

Mr. McCORD: I object to that as immaterial.

The COURT: I think he could answer that if he furnished the books or anything of that kind going to show what was done.

114 A. I instructed my superintendent, Mr. Waldo, to make up that statement, or have it made up, from the books.

Q. Do you know of your own personal knowledge that all of the payments were made which are exhibited on this statement, as against this lot of salmon?

Mr. McCORD: I object to the question as incompetent, irrelevant and immaterial, and the statement has not been shown to have been taken from the books. That is not the best evidence, the best evidence is what the books show.

The COURT: If the witness has seen this statement exhibited here and has gone over it and has personal knowledge concerning the items mentioned in the same, he can testify from that, from his personal knowledge.

Mr. McCORD: I want to know whether he knows of his own knowledge, independent of that statement, or whether he is only refreshing his memory from it. It is not the best evidence and I object to the question as not calling for the best evidence. The best evidence is the vouchers showing the payment, not to let this witness testify as to his conclusion that the money was paid, or that this account is correct, from a statement made up by somebody else. He says Mr. Waldo made it up.

The COURT: We can find out if he had these transactions and had personal knowledge of all of them or any of them.

Q. Have you examined the statement yourself?
A. Yes sir.
Q. Do you know whether or not the charges of commission and exchange on this statement were paid out by the Carlisle Packing Company in connection with the sale of these goods?

Mr. McCORD: I object to the question on the ground it is irrelevant immaterial and incompetent, not the best evidence. It is attempting to drag into this court and allow the witness to testify as to the correctness of this statement which counsel has and which was prepared by somebody else, which he knows nothing about, and he is undertaking to prove the contents of these accounts in that slip-shod way. It is not within the rules of evidence and is incompetent, irrelevant and immaterial, not the best evidence, and the witness is testifying as to his conclusions from books which are themselves the best evidence.

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The COURT: His attention can be directed to any particular transaction, and he can testify to those transactions. I believe the question is a little too general as now framed.

Q. Were you here yesterday when Mr. Bryne was on the stand?
A. Yes sir.
Q. Did you hear the cross examination?
A. Yes sir.
Q. Of Mr. Bryne by counsel for the defendants?
A. Yes sir.
Q. Do you know the firm of Brady & Pichot?
A. Yes sir.
Q. Do you know the account of Brady & Pichot in the books?
A. Yes sir.
Q. Do you have any personal knowledge of whether the charges on the books of the Carlisle Packing Company charging them with cash or checks were actually paid them?

Mr. McCORD: I object to that because it still refers to the books; the books are not in evidence. He has not attempted to put them in evidence or any items in the books pertaining to this matter, and is now asking the witness whether those books are correct.

The COURT: The books are only entries that he says he has personal knowledge about, and I will let him answer. (Question read).

A. Yes sir, I paid them myself; I conducted every transaction

that was made with Brady & Pichot, and I am familiar with all of them

116 Q. Without referring to the amounts of those payments, I will ask you to state whether you know they are correctly entered in their account in the books?

Mr. McCord: I object as calling for expert knowledge, asking for the conclusion of the witness, incompetent, irrelevant and immaterial, not the best evidence and mere guess work. The best evidence if he paid it is to produce the check or voucher showing it was paid.

The Court: I will let him answer; I will let him testify what was done and whether or not he knows of these entries, whether they were made and whether any were made he did not know about. (Exception allowed the defendants.) (Question read.)

A. I know that they check with the bank statement, the money received from the bank.

Mr. McCord: I move to strike the answer as not being responsive.

The Court: The answer may be stricken.

Mr. McCord: If he paid by checks let him produce them.

The Court: He may answer this question. (Question page 69, line 1 read to witness.)

A. You are referring to those checks?

Q. I am referring to those checks that were paid to Brady & Pichot are they correctly entered in the books?

A. Yes sir.

Q. What page in the ledger are you referring to, the Brady & Pichot account?

Mr. McCord: I object to counsel referring to the books until he introduces them in evidence. I do not think he has a right to refer to the books not introduced in evidence.

The Court: He is testifying as to certain alleged checks and the payment of a certain account represented by the checks, I will let him testify.

117 Q. What page in the ledger shows the Brady & Pichot account?

A. Page 54.

Mr. McCord: I object to the witness testifying from the ledger as it is not the book of original entry.

The Court: I understand that some keep one of the books and some both the journal and ledger.

Mr. McCord: I think counsel ought to introduce those books in evidence. If they are entitled to go in they ought to be identified in such a way as to go in and if they cannot go in the Court ought not let the witness take the books and testify from them and get the matter before the jury, what the books contain, whether the books are to go in or not.

The Court: I suggest the proper thing, in order to assist the jury, would be to segregate the matters and things in the books affect-

ing this transaction in controversy, and I am going to permit the inquiry along that line. There is no use putting these books in before the jury in a bunch.

Mr. McCORD: It is not shown that the books would be entitled to go in as evidence if offered.

The COURT: If the witness knows about this particular matter of his own knowledge that he is being questioned about now, I will let him answer. (Exception allowed defendants.)

Q. I hand you a check purporting to have been drawn by the Carlisle Packing Company, and ask you if you ever saw that before?

(Plaintiff's exhibit 17 marked for identification; handed to witness.)

A. Yes sir.
Q. Who signed that check?
A. I did.
Q. What time did you sign it with respect to the date?
A. September 16, 1908.
Q. What is the amount of it?
118 A. Two hundred and sixty-two dollars and forty-seven cents.
Q. In whose favor is it drawn?
A. Brady Pichot.
Q. I will ask you whether the check was ever paid?
A. Yes sir.
Q. What was that check for?
A. Commission on that flat pink salmon.
Q. Is that one entry in the book in their account debiting them? (Witness refers to books.)

Mr. McCORD: I object to that sort of a question. He can testify if he knows what items made up that check, what particular sales of salmon, but to go to work and ask him that kind of a question is not proper, the book is not in evidence; I insist upon my objection.

The COURT: If he wants to trace that entry in the books I will permit him to do so, and he can tell what book and page it appears on.

A. Yes sir, it was entered the same day.
Q. On what page in the ledger?
A. Page 54.
Q. How is that account headed in the ledger?

Mr. McCORD: I object to all these questions on the ground they are incompetent, irrelevant and immaterial, not the best evidence; it is not a book of original entry; the books have not been identified, not proven, not shown to be entitled to be introduced in evidence, and the witness is testifying as to their contents and getting into evidence indirectly what they could not get in directly.

The COURT: I think the books have all been identified. I think he was asked a good many questions about that yesterday; he may answer this question.

A. This check is entered under Brady & Pichot, entered on September 16, on the second line, on page 54.

Q. Of the ledger?

119 A. Yes sir.

Q. I will show you another check dated October 17, 1907, and ask you who signed that, if you know?

A. I did.

(Check marked plaintiff's exhibit 18 for identification. Plaintiff's exhibit 19 marked for identification.)

Q. Referring to Plaintiff's identification exhibit 18, was that check ever paid?

A. Yes sir.

Mr. McCord: I object to that, if it was paid it shows on its face that it was paid. He does not know whether it was paid or whether it was not except by information and hearsay.

Q. Do you know whether it was paid or not?

A. Yes sir.

Mr. McCord: That check should be properly endorsed. The way to prove that is to prove that the signature is authentic: the signature of Brady & Pichot.

The Court: He can tell whether it went out in the ordinary course of business and whether it came back and was paid.

A. This particular check was given to Brady & Pichot in Seattle.

Q. Was it ever paid by your bank on which it was drawn?

A. Yes sir.

Q. State whether or not that check is recorded in the ledger in Brady & Pichot's account?

A. Yes Sir.

Mr. McCord: To each of these questions I make the same objection, and ask the Court to let that objection run to each one.

The Court: Very well.

Q. Look at plaintiff's identified exhibit 19 and state what that is, if you know?

A. A check for $200 to Brady & Pichot.

120 Q. Who signed it?

A. I did.

Q. State whether it was ever paid?

A. It was paid.

Q. Is it among the items charged against their account in that book?

A. Yes sir.

Q. On what page?

A. On page 54.

Q. Of the ledger?

A. Yes sir.

Q. What did you do with these checks after you drew them, Mr. Wright?

A. I sent them to Brady & Pichot.

Q. How did they get back to you?
A. The bank returned them.
Q. What bank?
A. The First National Bank of Bellingham, this one. (Indicating check.)
Q. What is this stamp on the face of the check, what does it indicate if you know?
A. It indicates they are paid.

Mr. Dorr: I will ask that these checks be admitted. (Presenting plaintiff's identified exhibits 17 and 18.)

Mr. McCord: I object to their introduction as being irrelevant, incompetent and immaterial and not the best evidence. They have made up a statement here and attempt to show various commissions paid Brady & Pichot Company.

The Court: I understand counsel started in to prove the specific items and this statement comes in only as a sort of compilation of them.

121 Mr. McCord: I object to the introduction of exhibits 17 and 18 on the ground they are not referred to any particular items of commissions, there are no vouchers showing any payments; they are simply checks from one man to another, they are not in the same amounts at all that are specified in the alleged statement, incompetent, irrelevant and immaterial.

The Court: They may be admitted. (Exception allowed defendants.)

Q. What were these checks written for?
A. For commission on the pink salmon.
Q. What pink salmon?
A. Of the Carlisle Packing Company, that 10,000 cases.
Q. What was the commission paid them for?
A. For selling the salmon.

Mr. McCord: I object to that question as being immaterial whether he paid any commissions or whether he did not. That is not an element of damage, they are not entitled as an element of damage to recover for any commissions paid out. If they elect to take the goods and sell them it is their duty to sell them upon the market as advantageously as possible, and the question is incompetent, irrelevant and immaterial.

The Court: I apprehend that probably the commissions would not be proper, but I understand now counsel is seeking to show the actual price he got for the goods, and his theory is that the commission which pertain to the trades have to come off and in order to show the actual price he did get for these fish the commissions would have to be shown.

Mr. Dorr: That is it exactly. Our contract was that the goods were sold to Mr. Deming at an upset price less 1½ and 5% and we sold them to him at an upset price less 1½ and 5%.

The Court: I understand from the tendency of this evidence

that your theory is that these goods were sold according to
122 a well known and established custom pertaining to this class of business and that in entering into these transactions that custom was incorporated as a fixed term.

Mr. DOBE: That is exactly the theory.

The COURT: Upon this particular proposition, I will let this evidence go at this time to the jury and later I will be glad to hear from you gentlemen preceding the instructions if you have anything to say about that, but at this time I do not care to take the time to try out that matter; we want to get the facts before the jury, and the jury will certainly be guided by the instructions touching the items in controversy. I will hear the evidence subject to the instructions of the Court later.

(Exception allowed the defendants.)

The COURT: It will be withdrawn from the jury in case your theory proves to be correct. I understand the theory of the plaintiff, and it will be admitted at this time upon that theory.

(Exception allowed defendants.)

Q. Referring to these cannery books again, state whether they were correctly kept, or not; whether the entries were properly made with relation to this transaction?

Mr. MCCORD: I object to the question as being immaterial. No books of this kind are entitled to be admitted in evidence by showing one item or account is correct as showing all were correct.

The COURT: Let him answer.

A. That account is correct.

Q. I will ask you generally whether you are able to state that these books were correctly kept and the entries directly made therein according to the transactions with respect to all matters pertaining to this lot of pink flat salmon, which is in controversy?

Mr. MCCORD: I object to the witness answering that ques-
123 tion because the witness has already stated the books were not kept by himself but by a bookkeeper. It has not been shown that he has any knowledge of books, how they are kept and whether the entries were correctly made or not.

The COURT: I do not remember that the witness has shown that he has personal knowledge of the matters that are in that statement.

Q. What is the fact with reference to that matter; have you personal knowledge of the transactions that are in this statement, plaintiff's identified exhibit 16, with relation to the accounts of the pink salmon, which is in controversy in this action?

A. Yes, sir.

Q. Who conducted those transactions?

A. I did.

Q. Did you have, and have you, personal knowledge of each and all of them?

A. Every one of them.

Q. Do you know of your own knowledge whether the accounts referring to these transactions were correctly entered in these books?

A. I know they balance with the bank statement; the money that was returned by the bank.

Mr. McCORD: I move to strike the answer as not responsive.

The COURT: The last answer will be stricken.

Q. Do you know whether outside of the bank statement, can you tell whether the accounts that were entered in those books were correctly entered referring to this transaction?

Mr. McCORD: Of your own knowledge.

A. To the best of my knowledge—I did not keep the books myself but I had them kept.

Mr. McCORD: I move to strike that as being argumentative; if he does not know he is not entitled to testify here.

124 The COURT: Have you gone over this statement here, the exhibit that is mentioned here?

A. Yes, sir.

The COURT: You have knowledge of each of the transactions referred to there?

A. Yes sir. I made all the transactions myself, individually.

Mr. McCORD: He may have made the transactions but whether that is a correct representation of those transactions is another question.

The COURT: That is what counsel is trying to find out. I suppose if an objection is made they will have to take each transaction and trace it through, since he is not a bookkeeper.

Mr. DORR: I can prove them generally because they are his books; I can prove generally they were correctly kept.

The COURT: If he knows he can tell.

Mr. McCORD: I object to that question on the ground that under the testimony he does not know anything about the correctness of the books, which he did not keep and which he says he has no personal knowledge of.

Q. Do you know, Mr. Wright, whether or not the entries that were made in the books of the Carlisle Packing Company, with respect to the transaction that is in controversy, were made in the books that you have brought here, and have before you and from which this statement was made up as testified to by Mr. Bryne and by yourself whether those entries were directly and correctly made in those books?

Mr. McCORD: I object to that question; counsel is simply putting words in the mouth of the witness. He knows the transactions were made, but he says he supposes they were correct.

The COURT: If he knows, and he transacted the business of this concern and the books were kept under his personal supervision, he may tell what his knowledge is.

125 Mr. McCORD: And on the further ground that he is not qualified to testify as to the correctness of these books.

The COURT: He may answer.

A. The books were correctly kept, we had expert——

Q. How large a business is the Carlisle Packing Company?

A. We did about $325,000.00 worth of business last year.

Q. How large was it in 1907?

A. About $100,000.00.

Q. About $100,000.00 worth of the pack, you mean?

A. Yes sir.

Q. I will ask you if you can state to the jury and the Court the amount of money that your company received from the sale of the salmon which is in controversy in this action? (Hands statement.)

Mr. McCORD: I object to counsel's handing the witness that sort of a statement and asking that question. He is not testifying from his own knowledge, but is testifying from the statement.

The COURT: I do not believe, that is correct, Mr. Dorr. If you want to trace those through like you did the other proposition, very well, but until there is something on which that is based I do not believe he should take that statement and look at that and say it is correct as to amount.

Mr. DORR: I now offer the cannery books in evidence.

Mr. McCORD: I object to the introduction on the ground they have not been properly identified. There has been no attempt to show those books were correctly kept, to show they were the transactions but on the contrary Mr. Bryne said he was not able from the cannery books to answer one question that I asked him until he got the memorandum that was furnished him.

The COURT: Mr. Bryne was only dealing with this expert's tabulated statement. I understand that is not offered at this time.

Mr. McCORD: I say as to one item taken at random, he showed the books did not show all the transactions with all the parties. Before the books can be introduced in evidence it must be shown that they were correctly kept, that they contain all of the transactions with all the parties, that they are a complete record of the business of the company. Mr. Wright is not a bookkeeper; he assumes that the books are correct.

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The COURT: Mr. Dorr, are you prepared to furnish some memorandum showing the books and pages on which the transactions appear touching this particular deal alleged to have been had between the plaintiff and the defendants, and the subsequent deals involving this 10,000 and some cases of salmon?

Mr. DORR: Yes sir, we will have those payments pointed out.

The COURT: If you can do that, I think on the statement of this witness that he had personal knowledge of these transactions I will allow the books to go in as to these transactions. I do not think they should go in generally as they might tend to confuse the jury, and these things should be tabulated and the pages in some way tied up or turned down so there attention could be drawn to the particular pages in controversy here.

Mr. DORR: We will undertake to do that, your Honor.

The COURT: The books, with that understanding, I think, should be admitted.

Mr. McCORD: I will make the further objection to one particular entry, one that Mr. Bruce attempted to put in yesterday, that is what purports to be a statement contained in the journal made in July, 1909, containing a resume of the transactions relating to this pink salmon, put in here after the transaction occurred. I object to that.

Mr. McCORD: I will make a further objection to that journal; the journal contains a resume made a year after the transactions occurred.

The COURT: I have indicated what can go in and when
127 we come to make up that memoranda I will inspect it and if anything is made up which is a sort of a balance sheet, of course, that will be a matter for consideration at that time. Counsel understands what I am ruling on now and what will go to the jury will be a matter that will be first inspected. This is the ruling upon the entries made in the transactions about which the witness has testified, concerning the entries involving the matters he is testifying about and not some resume that may be made up. Nothing will be submitted to the jury except the parts that are pertinent; we will take that up when we reach it. The books are in with that one thing to look after, and you will proceed upon that theory in your examination of this witness.

Q. How long have you been in the salmon packing business?

Mr. McCORD: I object to that question because they went over it.

The COURT: I will let him answer again.

A. Twenty-four years.

Q. Whereabouts have you been engaged in that business?

A. On the Fraser River and on Puget Sound.

Q. How long on Puget Sound?

A. Fourteen years.

Q. And I believe you stated yesterday how long at the Carlisle Packing Company?

A. I have been there 7 years; this is the 8th season.

Q. You stated that you had contracted with Mr. Deming or his company for cans for these fish?

A. Yes sir.

Q. I will ask you to state whether you had any conversation with Mr. Deming during the fall of 1907 when you were packing these identical fish as to the style of cans that was to be used for that packing, and if so, what was the conversation?

Mr. McCORD: I object as immaterial.

128 The COURT: He may answer.

A. We had a two line cannery, one a tall line and one a flat line.

Q. Please explain that to the jury?

A. We had two lines of machinery; the tall line is fixed so the cans are filled by machinery, and the other has to be filled by hand, the flat line.

Q. You see the jurymen are not cannerymen and I want you to explain that in detail.

A. The tall line where the tall cans are filled and the flat line where the flat cans are filled. I wanted tall cans because we had no machinery to fill the flat cans, and our contract with Mr. Deming read——

Q. Never mind that; state the conversation you had with him.

A. I saw Mr. Deming and told him I wanted tall cans for——

Mr. McCORD: I object to that; Mr. Wright stated on direct examination yesterday that the can contract had nothing to do with the contract.

The COURT: That is not the proposition here. I understand counsel is now seeking to show something that was said and done that might tend to prove or disprove the original agreement.

Mr. DORR: That is it exactly.

The COURT: And whether or not that would be consistent with whether there was or was not a contract. I will let him answer this question.

Q. State when those conversations came up—how many did you have, if you know?

A. About 4 or 5.

Q. When did they come up and how did they happen to come up, state the facts fully?

A. In the latter part of August and along in September, when we were packing the fish.

129 Q. How did you happen to get in a conversation with Mr. Deming about this?

Mr. McCORD: I object as being wholly immaterial how he happened to have the conversation; what has that got to do with the case?

The COURT: You may state where it was and about the time and the substance of it.

A. The conversation occurred in South Bellingham, when I went after the cans, and I wanted tall cans, but he told me it was impossible to give them to me, and he gave me flat cans, and I objected to taking the flats because it cost so much more to fill them and it was so much slower, but I could not get the talls; he supplied them and I had to take the flats.

Mr. McCORD: I move to strike out the answer as immaterial.

The COURT: Go ahead, I will see whether it becomes immaterial or not.

Q. That was in August, you say?

A. September, I think, latter part of August and along in September.

Q. When were you back there again; when did you have the second conversation?

A. Three or 4 days afterwards.

Q. What occurred then?

A. The same thing. I would like to get talls and tried to get them every time I went there.

Q. What did he say to you?

A. That it was impossible to give them to me, that he had to give me flats.

Q. What did he say about the pack, if anything?

A. I do not remember that there was anything said about the pack at that time.

Mr. McCORD: I move to strike out all that portion of the conversation up to the present time.

130 The COURT: I will let the whole conversation in.

Q. How many cans did you get at one time?

A. Enough for 1000 to 1500 cases.

Q. And when were you back after that?

A. I was there nearly every day during the time those fish were packed.

Q. What were you there for?

A. For cans. I was running the boat myself.

Q. You have given two conversations, now were there any more?

A. I remember of—I think there were 4, but I am not quite sure about any but three, that I remember.

Q. Give the third?

A. It was the same as the others, I tried to get tall cans every time I went there.

Q. What did Mr. Deming say to you?

A. That it was impossible to give them to me.

Q. What reasons did he give, why it was impossible?

A. It was impossible, he said, because they could not make them fast enough.

Q. What else did he say, if anything?

A. I do not remember of anything else.

Q. How about the 4th conversation, when were you there then?

A. That was about—while we were packing those fish I think I made 4 trips. Sometime after that it was telephone conversations, because the regular boats brought some of the cans.

Q. What occurred at the fourth conversation?

A. He told me it was impossible to give me tall cans.

Q. What did you tell him?

A. I tried to persuade him to let me have some tall cans, and not give all the talls to others and not give me any and to give me all flats. I tried to get some talls.

131 Q. Could you get any talls?

A. At this time, no.

Q. That is for these fish?

A. Yes.

Q. Was there any other place for you to buy cans?

Mr. McCORD: I object to that as immaterial.

The COURT: He may answer.

A. No, not and get them in time.

Q. I want you to state to the jury what you did in the way of trying to sell this salmon after Mr. Deming refused to pay for them.

A. I offered them through the brokers, all the brokers I knew of.

Mr. McCORD: He went over that yesterday.

The COURT: Yes, I think he went into that fully, Mr. Dorr.

Mr. DORR: I did not finish it up.

The COURT: If it is not complete he can carry it through.

Mr. DORR: I want to find out what date he began to sell and whether he worked to the best advantage.

The COURT: I understood he testified fully about that, but if there is any question about it you can go ahead.

Q. What did you do in the way of disposing of this salmon after you commenced to sell them?

A. I offered it to all the brokers I knew. There are 3 firms of brokers that sell about 75 or 80% of all the salmon that is packed in America, and those brokers refused to handle it at any price. It was outlawed and they objected to having anything to do with it.

Mr. McCORD: I object to any conversation had after the breach of this contract, telling what they refused to do, that is hearsay and is not competent, and I move to strike out all that stuff.

Mr. DORR: It is not stuff, but I do not think it is competent to tell what they told him, but I think it is competent to tell what he did.

132 The COURT: You may tell what efforts you made. That may be stricken.

A. I offered them to Deming-Gould Company, Kelley-Clarke Company; Forman & Company, Brady & Pichot, Griffith, Durney & Company and the Corbett Commission Company of New York.

Q. Who had been the selling agent for your company prior to 1907?

Mr. McCORD: I object to that as being immaterial who handled his salmon prior to that year, that is not competent, it is immaterial and irrelevant.

Mr. DORR: I will connect it up, your Honor.

The COURT: If you connect it up, it will be all right.

A. Kelley-Clarke Company of Seattle.

Q. After you had to take the salmon over what effort, if any, did you make to get that company to handle it?

A. I tried and they refused to handle it.

Q. What did you do about it?

A. I went to their salesman.

Q. Where did you go?

A. To Seattle.

Q. At whose office?

A. Kelley-Clarke's office.

Q. Who did you see there?

A. Mr. Hanlin.

Q. Who is Mr. Hamlin?

A. The firm's salesman, the salmon salesman for Kelley-Clarke Company.

Q. How long has he been there to your knowledge?

A. Seven years; I do not know how much longer.

Q. Did they take it or did they sell it?

Mr. McCORD: I object as incompetent, irrelevant and immaterial. If he offered the salmon to various people that may be com-
133 petent but to go into the details of this would be incompetent.

The COURT: I think I will let him answer this.

A. They refused to offer it.

Q. Did they sell any of this salmon for you?

Mr. McCORD: I object to that.

Mr. DOBB: I asked him if they sold any of this salmon for him.

Mr. McCORD: I move to strike out that answer which purports to be some conversation with Kelley-Clarke Company of Seattle.

The COURT: If there is any conversation of that kind it may go out.

Mr. DOBB: I withdraw the answer, what they said to him; I want to know whether they sold any salmon for him.

The COURT: I think that is proper; let him answer.

A. No, they did not sell any of it.

Q. Who did sell it?

A. Brady & Pichot, Gorman & Company and Griffith & Durney Company.

Q. Where is Griffith, Durney Company?

A. San Francisco.

Q. Where is Gorman & Company?

A. Seattle.

Q. Outside of the brokers you did not make any effort to sell it?

A. I sent some samples out once or twice to different people.

Q. In dealing with Griffith, Durney & Company what was your method as to commission, did you sell directly to them, or did you sell through them as brokers or how did you transact the business with Griffith, Durney & Company?

A. We sold to Griffith, Durney & Company and shipped under their instructions to those other people.

Q. In those cases, Griffith, Durney & Company, how did you bill the goods?

Mr. McCORD: I object to that as not the best evidence; how he billed the goods——

134 The COURT: If he knows he may tell.

Q. How did you sell the goods, I want to know whether it was at a net price or a gross price, or how you sold it?

Mr. McCORD: These people live in San Francisco; presumably, that contract was in writing, if they had any arrangement with him the witness cannot testify until it is shown this contract was not in writing.

Mr. DORR: I asked what he did, how he did that business.

Mr. McCORD: I would like to ask if the contract with Griffith, Durney & Company was in writing?

A. It was all done by telegraph.

Mr. DORR: I am not asking what the telegrams were, I am asking what he did.

The COURT: Go ahead; tell what you did. If you get down to the contract, if it were evidenced by any written instrument or telegrams that would be the best evidence.

Q. I want to know how you did the business, whether on commission or whether they were the buyers?

A. We sold to them at 1½ and 5%.

Mr. McCORD: I move to strike out that answer; that is the very thing your Honor said would not be the best evidence.

The COURT: I think for the present that should go out.

Q. Have you any of those telegrams?

A. I do not think so. I would probably get them at my hotel. If a man calls up and asks if I will sell him 1000 cases of salmon, I would say yes or no, and that would be the sale.

Mr. McCORD: I object to his reasoning, that is not proper.

A. I do not know whether I have them or not.

Q. How was the salmon passed over to them how was it billed?

Mr. McCORD: I object to that as an attempt to bring it in in an indirect way. If he had any arrangement with Griffith, Durney & Company that is in writing.

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Mr. DORR: We are trying to find out what these goods were sold at in the open market. I do not care whether it was by writing or telegram or by word of mouth, I want to find what the market price was and whether the plaintiff used its best endeavors to sell the salmon and what it got out of it.

The COURT: You may direct his attention to these shipments and what he got out of it.

Q. I want to know how this salmon was delivered, as far as the delivering it and getting the money was concerned, did you go down there and get the money, or how did you get it?

A. No.

Q. Tell the jury what happened?

A. We attached a draft to the bill of lading.

Q. What did you do with the draft and bill of lading?

A. Took them to the bank.

Q. What bank?

A. The First National Bank of Bellingham, and they collected it and placed it to our credit, or the credit of the warehouse receipts.

Q. In these cases where you sold the salmon to Griffith, Durney & Company and these other packers, did the money come through the First National Bank?

Mr. McCORD: That is asking for a general statement, I object to the question.

The COURT: He can state if he knows; answer the question.

A. All of it came through the bank except, I think, 25 cases which Brady & Pichot collected for without authority. We owed them for brokerage or something. Outside of that all of it was sold with bills of lading attached.

Q. Something was said yesterday about a letter being written to the defendants, or some of them, by your attorneys, who were
136 your attorneys at that time?

A. Dorr & Hadley.

Q. What particular person attended to the business for you?

A. Mr. A. M. Hadley.

Q. Mr. A. M. Hadley, of this city?

A. Yes sir.

Q. Were you present when the letter was written?

A. Yes sir.

Q. It was written under whose direction?

A. Under mine.

Q. Did you have any personal interviews with Mr. Deming at any time prior to the 5th of February, 1908, after the salmon was packed for that year, at which you had any conversation with reference to the taking or not taking of this particular salmon?

Mr. McCORD: I do not know if he understands the question.

Q. I will change it. When was the first intimation you had that the defendants would not accept this salmon?

A. On February 5, 1908.

Q. Prior to that time had you ever made any effort to sell it?

A. No sir.

Mr. McCORD: I object to that as being entirely immaterial.

The COURT: If he had, I think it would be very important in this matter.

Q. One of the items sued for in this action is one of $1706.84 alleged to have been paid to the Bellingham Warehouse Company; I now hand you a check identified as Plaintiff's exhibit 20, and ask you to inspect it, and state if you know who signed it?

(Plaintiff's exhibit 20 marked for identification.)

A. I signed it.

Q. When?

A. August 21, 1909.

137 Q. What did you do with it after signing it?

A. I sent it to the Bellingham Warehouse Company.

Q. What is the amount of that check?

A. Seventeen hundred and six dollars and eighty-four cents.

Q. State whether the check was paid by the bank if you know?

Mr. McCORD: I object to the question as incompetent, irrelevant and immaterial and not within the issues in this case, not a proper element of damages.

The COURT: Let him answer. (Exception allowed the defendants.)

A. It was paid.

Mr. McCORD: I presume the Court will give an instruction to the jury on that question as well as the other?

The COURT: Yes.

Q. What was this check given for?

A. For storage and insurance on the 10,900 cases of salmon.

Mr. McCORD: I object to that as incompetent, irrelevant and immaterial.

The COURT: Overruled. (Exception allowed defendants.)

Q. Why did you pay it?

A. We had to pay it to release the goods.

Mr. McCORD: I move to strike the answer on the ground the question with reference to the check was too indefinite, it does not show what time was covered.

The COURT: I understand the question is only offered in connection with the alleged payment.

Mr. DORE: To prove the payment.

Q. You say you had to pay the bill to release the goods, what do you mean by that?

A. We were notified by the Bellingham Warehouse Company that the storage must be paid before any more salmon was shipped, storage and insurance, this was the amount.

Q. For what period of time was this storage bill incurred?

A. From February, 1908, to August 1909.

138 Q. You say that it included some insurance?

A. I think so, yes.

Mr. McCORD: What he thinks is not proper evidence. If he knows what it is for, what items, he should state them.

The COURT: Yes, state what you know about it.

A. This was storage and insurance.

Q. Did you have a bill from the Warehouse company?

A. Yes.

Q. I now hand you a paper marked plaintiff's identified exhibit 24 (said exhibit marked) I will ask you to inspect that paper (witness inspects paper) and state what it is, if you know?

A. It is a statement from the Bellingham Warehouse Company for storage and insurance on salmon in the Bellingham Warehouse Company's warehouse.

Q. What relation, if any, does that bill have to the check?

A. This check is in payment of the bill.

Q. Is the bill receipted by anybody?

A. It is receipted by the Bellingham Warehouse Company.

Q. What is the amount of the bill?

A. Seventeen hundred and six dollars and eighty-four cents.

Mr. DORR: I will offer this bill and check in evidence, being plaintiff's identified exhibits 21 and 20.

Mr. McCORD: I object to them on the ground they are irrelevant, incompetent and immaterial, and not within the issues of this case, they do not show a proper charge against these defendants or any of them, and upon the further specific ground that the bill for $1706, and the check in payment of it shows items on October 31 merchandise, on December 7, for insurance, October 28, storage to date as per bill rendered for $976.00; it does not say when it began or from what dates or whether it goes back prior to February 1st.

How much of that was prior to February 1st, according to
139 plaintiff's own theory and how much is after that date is not segregated, and therefore, is not proper to prove the payment of the gross sum under the plaintiff's own theory.

Mr. DORR: He testified yesterday that Mr. Deming told him there would be no warehouse charges on this salmon and he testified today that this bill was for charges that had been incurred since February.

The COURT: I understand he said between February, 1908, and August, 1909.

A. Yes sir.

The COURT: Was there any insurance in that bill charged that represented any time prior to the 5th day of February, 1908?

A. Mr. Deming in his settlement on the 5th of February, 1908, took off all charges against this salmon as well as the other salmon for all of the insurance that was at that time.

The COURT: So you claim this is a bill for subsequent charges for insurance and storage?

A. Yes sir.

Mr. McCORD: Before it is admitted I would like to ask a few questions.

The COURT: If you wish I will reserve my ruling until after the cross-examination.

Q. I now hand you a check, plaintiff's identified exhibit 22, being check No. 863, drawn in favor of Gorman & Company, for $97.89, and ask you to inspect that check, and state what relation it has to this controversy, what is it for? (Exhibit referred to marked.)

A. This check was given as commission on pink salmon.

Q. What pink salmon?

Mr. McCORD: I object to the question as immaterial, not within the issues of this case, irrelevant and incompetent.

The COURT: The same proposition, I understand. Overruled.

A. Flat pinks at issue in this case.

140 Q. Who are Gorman & Company?

A. Brokers at Seattle.

Q. What did they do?

A. Sold 600 cases of flat pinks.

(Plaintiff's exhibit 23 marked for identification.)

Q. I now show you a check which is marked plaintiff's identified exhibit 23, and ask you to state what that is, if you know?
A. A check to Gorman & Company for $111.11.
Q. What had that to do with this transaction?
A. It was for commission on a car load of pink salmon.

Mr. McCord: I move to strike the answer as irrelevant, incompetent and immaterial; the same objection as before made.
The Court: The motion is denied.

Q. Is that a part of this salmon in controversy?
A. Yes sir.
Q. What did they do to earn this amount?
A. They sold this salmon on commission.
Q. What rate of commission were the checks based on?
A. Five per cent.
Q. State whether or not these checks were paid and charged to your account in the bank?
A. Yes sir.

Mr. McCord: The same objection.
The Court: Overruled.

Q. What bank were they drawn on?
A. The Seattle National Bank of Seattle.
Q. How did you happen to draw these checks there if you were doing business with the First National Bank of Bellingham?

Mr. McCord: I object as immaterial; he did it because he had the money there, I suppose.
The Court: I think it is immaterial.

Q. Who signed this check, the one I show you? (Indicating.)
141 A. I signed both of them.
Q. I now show you a check, number 57, identified as plaintiff's exhibit number 24 (number 24 marked); check number 136, identified as plaintiff's exhibit number 25 (25 marked); check number 160, identified as plaintiff's exhibit number 26 (26 marked) check number 383, identified as plaintiff's exhibit 27 (27 marked) and I will ask you to take these checks, Mr. Wright, and examine them and state what connection, if any, these checks have with this account in controversy here, and who signed them, and what was done with them, if you know?
A. Yes, those were all given to Brady & Pichot, for commissions on these pink salmon.
Q. Some of them, I see, were drawn in favor of the bank?
A. They were for drafts that they drew before it was due.
Q. What pink salmon do you refer to?
A. The flat pinks that are in issue in this case.
Q. And these amounts cover what?
A. They cover commissions to Brady & Pichot.
Q. Were these checks paid by the bank?
A. Yes sir.

Mr. McCORD: I would like the same objection to these interrogatories and answers that I made to the others.

The COURT: The objection is overruled and exception noted.

Mr. McCORD: My objection goes to all these questions.

The COURT: Yes.

Q. Exactly how many cases were involved in this transaction, Mr. Wright?

A. Ten thousand, nine hundred and three.

Q. I notice in the statement, exhibit 16, reference to 10,920, a deduction of 6 for swells——

Mr. McCORD: I object to counsel going back now and trying to run that statement in; it is not before the Court, not in evidence.

Mr. DOAK: What I want to know is why those 17 cases were deducted and not charged up to Mr. Deming or the defendants.

Mr. McCORD: It is wholly immaterial.

The COURT: I do not think it would be material, how or why that came to be eliminated.

Mr. DOAK: We want to explain that with reference to this statement because it starts at 920 and is reduced to 903.

The COURT: If that is the purpose I will let you explain it. I will let him answer.

A. Those were samples that went out, that were sent out to the trade, different people, and were not charged to anybody.

Q. What about the swells, what do you mean by swells?

A. They are spoilt cans, that came out as they were labeled and shipped.

Q. The 10,903 is the net amount, I understand?

A. The net amount that we charged and received payment for.

(Whereupon court adjourned until 9:30 on the morning of May 2, 1910.)

The COURT: It is stipulated between the parties to this action that the trial of this cause shall be continued until 9:30 o'clock Monday morning, May 2, 1910, and concluded thereafter; that neither party will take any advantage of the fact that the calendar month will expire in the meantime, and that the case will be tried and concluded without reference to the expiration of the calendar month. (Stipulation concurred in by counsel for plaintiff and defendants.)

(Whereupon at the hour of 9:30 on the morning of Monday, May 2, 1910, court opened pursuant to adjournment, all parties being present as herein first shown, counsel for plaintiff and counsel for defendant conceding the jury present the trial proceeded.

143 Mr. FRANK WRIGHT, again taking the stand, testified as follows:

Direct examination by Mr. DORR resumed:

Q. What was the net amount that your company received for the resale of these pink salmon?

A. Twenty-eight thousand, four hundred and fifty-eight dollars and twenty-five cents.

Q. Mr. Wright, you already answered that the price was 90 cents, if I remember right, that you had agreed with Mr. Deming on as the upset price, what did you mean by 90 cents, 90 cents a dozen or a case, or what?

Mr. McCORD: I object to that as putting words in the witness's mouth.

The COURT: You may answer what you understood by the opening price, what it referred to.

Mr. McCORD: I object as being incompetent, irrelevant and immaterial and calling for a conclusion of the witness, what he understood.

The COURT: Let him answer.

A. It referred to 90 cents per dozen.

Q. Dozen what?

A. A dozen cans, 4 dozen cans in a case.

Q. I wish to ask you whether after the salmon was stored in the warehouse at South Bellingham, whether or not Mr. Deming could obtain that fish at any time at his pleasure on the payment of the price that you say he agreed to pay?

Mr. McCORD: I object as asking for a conclusion, he can state the facts and the jury can determine whether it could be done or not.

The COURT: I think he should state the conditions.

Q. What were the facts regarding the re-shipment of these fish out of the warehouse at Mr. Deming's pleasure after they were delivered at South Bellingham?

144 Mr. McCORD: I object to the question; the witness has already stated these goods were stored at the Bellingham Warehouse Company's warehouse, this company being a corporation, and that warehouse receipts, instruments in writing, were executed by that company to Mr. Wright, which contained the contract under which the goods were stored and that would be the best evidence as to who had the authority and the power over this salmon. That is a question for the jury. Whether Mr. Deming had a right to take it is a question of law and fact both.

The COURT: He is now directing attention to some understanding or agreement with respect to his drawing down the certificates of storage.

Mr. DORR: That is the question, exactly.

The COURT: That being involved the contract would be the best evidence.

Mr. DORR: I am asking what arrangements there was between them.

(Argument.)

The COURT: I think you are entitled to go into that under the issues in this case. (Exception allowed defendants.)

Mr. McCORD: I object as irrelevant, incompetent and immaterial, as asking for a conclusion; permitting this witness to place a legal interpretation upon the legal effect of the contract and allowing him to vary the terms of a contract by parol testimony.

The COURT: The objection is overruled and exception noted.

A. The bank had instructions to surrender them at any time the money was paid, and Mr. Deming understood it.

Mr. McCORD: I move to strike out the answer for the same reasons.

The COURT: What Mr. Deming understood would be your conclusion, that will be stricken. You can testify whether or not there was any conversation between you and Mr. Deming or the bank, for instance, or whatever you claim took place; the jury must draw the conclusions.

145 Mr. McCORD: I will have to except to the language of the Court as suggesting the answer to the witness, unintentionally, I beg your pardon, your Honor, but I feel impelled to do so.

The COURT: If it has that effect the Court will instruct the jury to disregard any comment the Court may make on the evidence.

Q. State the facts, Mr. Wright, as you understand the ruling of the Court.

The COURT: I make that statement because the witness has heretofore shown a disposition to state his conclusions as to conversations without giving the conversations.

A. I told Mr. Deming myself that whenever he wanted the salmon that I had arranged with the bank where he could pay the money into the bank and get the warehouse receipts. The business was all done that way.

Mr. McCORD: I move to strike the answer for the same reasons given in my objection.

The COURT: Let it stand.

Q. Did he withdraw any of the salmon that was in the warehouse independent of this that was in controversy in this suit, that was in the warehouse under the same conditions, that is, did he withdraw any of that salmon and ship it after it was warehoused the same as this was?

A. Yes sir, he did.

Mr. McCORD: The same objections.

The COURT: The same ruling.

Q. Just once or how many times, or more than once?

A. Just about $19,000.00 worth at one time, I think.

Q. How frequently did he make withdrawals?

A. I do not know that. He made it more than once. There was

other salmon that was stored that was not in this same warehouse, it was in the Pacific American warehouse, as I remember it.

146 Q. You only remember of one block that was withdrawn from this warehouse?

A. That is all I remember of, the bulk of it was shipped from the Carlisle Packing Company's home plant.

Q. How was some of the money paid for that that was withdrawn and shipped?

A. It was paid into the First National Bank of Bellingham.

Q. On your previous examination you made reference to the payment of $52,000.00 at some time by the defendants?

A. Yes sir.

Q. What was the date of that payment?

A. The 5th of February, 1908.

Q. Was that the exact amount?

A. No, it was something less than that, between $51,000. and $52,000.00

Q. Approximately $52,000.00?

A. Yes sir, I do not remember the exact amount.

Q. And at that time what was still owing to your company by the defendants, after that payment?

Mr. McCord: I object to that as asking for a legal conclusion; that is a matter in controversy here.

The Court: I think he should state if any fish was undelivered, and what the facts and circumstances were, and not state his conclusion as to what amount he might claim.

Mr. Dorr: The witness stated the other day, if your Honor please, in answer to a similar question to that, that on February 5th that morning that the defendant paid the $52,000.00, it left a balance of a certain amount; I now ask the privilege of having the witness correct that answer, because it was clearly an erroneous answer.

The Court: You can direct his attention to the matter,

147 if he has made any mistake he has a right to correct it.

Mr. McCord: I object to the witness making any statement to correct any incompetent and irrelevant testimony. It went in over my objection and he now goes back and attempts to rehash what the witness testified before. It was incompetent, irrelevant and immaterial, and is asking for a conclusion, and was asking for a conclusion then.

The Court: He may state the facts as to this matter.

A. I gave the net amount that it was sold for, what they owe us for would be the difference between what we sold it for and the opening price at 90 cents a dozen.

Q. In that respect do you wish to correct this answer?

A. Yes sir.

Mr. McCord: I move to strike out his answer and the answer to the original question for the reasons that I have indicated just now.

The Court: The motion is denied.

Q. Who notified you that you could not withdraw the final

quantity of this flat pink salmon without paying the warehouse charges?

A. Mr. Deming.

Q. How were you notified, orally or by letter?

A. I was notified by letter.

Mr. McCord: I move to strike out the whole answer. If he had any such notification the letter would be the best evidence.

The Court: The letter would be the best evidence.

Q. What did you do with that letter?

A. I brought it over and showed it to Mr. Purdy.

Mr. McCord: I object to that as immaterial.

Mr. Dorr: We are trying to prove the loss of the letter.

The Court: Go ahead.

A. I brought the letter over to Mr. Purdy and he objected——

Q. Never mind that, tell what became of the letter; have
148 you seen that letter since?

A. Not that I remember of.

Q. Do you know where it is now?

A. No sir, I do not; it may be in the office, but I do not know.

Q. Are you able to find it?

A. I don't know.

Q. Have you made a search for it, and were unable to find it?

A. Yes sir.

Q. About when was that letter received?

A. About the 20th of last August.

Q. What, if anything, came with the letter?

A. There was a request for payment of——

Mr. McCord: I object to this witness telling the contents of a written instrument.

The Court: It may be stricken.

Q. What was with the letter?

A. A statement of account with the Bellingham Warehouse Company.

Q. Is that the statement that has been identified in this case as an exhibit?

A. Yes sir.

Q. Is that the same statement that you testified you paid?

A. Yes sir.

Q. State whether or not that is the same bill for which you made the check which has been identified for the same amount?

Mr. McCord: I object to that as a repetition; that was given by the witness when Mr. Bruce was examining him, he went into that.

The Court: I will let him answer.

A. Yes sir, it was the same bill.

Q. I wish to ask you whether on the 5th of February, 1908, at the time that payment was made to the bank for your account by Mr.

Deming whether any of the salmon was included in that
149 payment from your 1907 pack that had not yet been sold?
A. Yes sir.
Q. Salmon sold by Mr. Deming that was still on hand?
A. Yes sir.
Q. Do you know how much?
A. No, I do not, exactly.
Q. What was the pack of your company that year?
A. Forty-one thousand cases.
Q. Exactly, or approximately?
A. Approximately, a little over 41,000, something over that.
Q. State to the jury at what price the other salmon was taken and paid for with respect to the opening price for those grades?

Mr. McCord: I object to that as immaterial, irrelevant and incompetent.
The Court: He may answer that question.

A. They were all taken at the opening price.
Q. Was the opening price the same on all grades or different on different grades?
A. It varied; the sockeyes were $1.65, and the pinks 80 cents.
Q. Pink what?
A. Pink talls.
Q. And what kind of sockeyes were $1.65?
A. Talls.
Q. What were sockeye flats?
A. $1.80.
Q. Were there any half flats?
A. Yes sir, $1.10, I think, or $1.05. I think $1.10.
Q. So there were different prices for different kinds?
A. Yes sir, all grades of fish.
Q. Was there any part of this amount that you are suing for paid, Mr. Wright?
150 A. Not any.

Mr. McCord: I object as immaterial; the burden is upon the defendants to show the payment.
The Court: Let it stand.

Cross-examination of Mr. Frank Wright by Mr. McCord:

Q. You say that in the early part of the year 1907 you made an agreement to sell your salmon to the defendants, I will ask you first to fix the time at which you had your first conversation with Mr. E. B. Deming in regard to the purchase of this salmon, as near as you can?
A. It was in the spring of the year, February or March, along there.
Q. In the latter part of February or the first part of March?
A. I do not remember positively what month it was; it was in the spring of the year.
Q. When was it with reference to the time that you consummated the can contract with the Pacific American Fisheries?

A. It was about the same time.
Q. Was it before or after?
A. I could not tell you.
Q. Had you finished the can contract before the agreement to dispose of your salmon was had?
A. I do not think so.
Q. You had not; you sold the salmon first?
A. I would not be sure about that; the can contract and the sale of the fish were entirely different transactions; one was not dependent upon the other.
Q. I was trying to assist you in fixing the date when the conversation in regard to the sale of the salmon took place. Was it after the can contract was executed?
A. It was about the same time.

Q. The first conversation you had with Mr. Deming in
151 regard to the sale of this salmon was had where?

A. In Mr. Deming's private office.
Q. In the office of the Pacific American Fisheries?
A. Yes sir.
Q. And that was along in the latter part of February or the first of March, somewhere along there?
A. Yes sir.
Q. What time of the day was it?
A. I do not remember for sure, but I think it was in the forenoon, the first one, if I remember right.
Q. You went into the main office and went around to Mr. Deming's private office?
A. Yes sir.
Q. Who was with you?
A. Mr. Arthur Wadhams.
Q. Mr. Wadhams went over with you to assist in making this contract, did he?
A. Yes sir.
Q. The contract for the sale of the salmon was—Mr. Wadhams was in your company at that time?
A. Yes sir.
Q. Was one of the officers of your company?
A. Yes sir. I am not sure that he was one of the officers of the company.
Q. He was the foreman?
A. Yes sir.
Q. And a stockholder.
A. Yes sir.
Q. And you went into the office, and he went with you, in the early part of the day, was it?

A. I am not positive about the time of day; I think it was
152 in the forenoon, if I remember right; I went to Seattle in the afternoon.

Q. Who else was present at that conversation?
A. Mr. Wadhams, Mr. Deming and myself.
Q. On what other occasion was Mr. Wadhams with you when you went into that office?

A. When we closed the contract.

Q. How along after the first conversation was it when you closed the deal?

A. Four or five days.

Q. And Mr. Wadhams went back with you the second time?

A. Yes sir.

Q. And those were the only two occasions you talked with Mr. Deming about the sale of this salmon prior to making the contract?

A. Yes sir.

Q. Only on two occasions?

A. Yes sir.

Q. What time of day was it you went with Mr. Wadhams to the office the second time?

A. In the afternoon.

Q. What time, do you know?

A. I do not know.

Q. Who was present then?

A. The three of us.

Q. In going to Mr. Deming's office you passed by the office of Mr. Drisko, did you not?

A. Yes sir.

Q. Did you see Mr. Drisko there?

A. It was a long time ago; I probably did. I was there many times and saw him nearly every time I was there.

Q. And you went into the office, and Mr. Drisko came into the office for the purpose of speaking to Mr. Deming on other
153 matters several times while you were there?

A. No sir. The door was closed.

Q. He was not in the room at all?

A. No sir.

Q. You are certain of that?

A. My recollection is pretty clear on it; I do not remember anybody coming in the office during the time this contract took place.

Q. When the contract was made and you walked out, you still saw Mr. Drisko there and stopped and talked with him about the fact that you had made a disposition of your salmon?

A. I do not think so.

Q. Would you say you did not?

A. No sir, but it is very unlikely that I did.

Q. You did not mention it to him at all?

A. I do not think so. It wouldn't be natural that I should.

Q. You could not say positively that you did not mention it; now, as a matter of fact, are you not mistaken in regard to Mr. Wadham's being with you at that time?

A. Not very likely.

Q. Is it not a fact that you never discussed this contract or the purchase of these fish with Mr. Deming in Mr. Wadham's presence at any time until after the arrangement was made and then over in front of the cannery some time afterwards, some days or weeks afterwards?

A. I discussed it in the presence of Mr. Wadhams in Mr. Deming's office too, and Mr. Deming made the proposition.

Q. Now, did you not discuss it with Mr. Deming afterwards in any other conversation before it was closed up?
A. No sir.
Q. Just the two times?
A. Yes sir.
154 Q. You referred to several other conversations, when did you have the next one with him?
A. I suppose I have a hundred with him during the season.
Q. In your direct testimony you referred to four conversations: when were the other two you testified about?
A. Every time I came to South Bellingham I think I went to see Mr. Deming and talk over conditions and general business, it was at one of those.
Q. Is it not a fact that you and Mr. Deming made this contract and you alone discussed it with him and reached an agreement without the presence of Mr. Wadhams in any shape or form?
A. No sir.
Q. Are you not absolutely mistaken about that matter?
A. I am not mistaken.
Q. When you went into the office you stated to Mr. Deming, did you not, that you desired to make an arrangement to sell your pack so you could close it up and get the returns for it about the first of January or February of the following year?
A. No sir.
Q. Did you not say to him you had been dealing with other people on a purely brokerage basis, but you wanted to make an arrangement by which you would not have to carry the salmon over beyond February, 1908?
A. No sir.
Q. That was the first proposition you made to him?
A. I did not make the proposition, he made it to me.
Q. Did you not insist upon that and Mr. Deming wanted to make a contract by which he would handle it on a brokerage basis?
A. No sir.
Q. Did not Mr. Deming, in the course of that conversation, state to you under no consideration would he agree to take the
155 salmon at the opening price or any other price other than the market value of the fish at the time they were to be taken in February, 1908?
A. He did not.
Q. That was what you wanted to accomplish; you wanted to get rid of your fish and close up the salmon deal and get your money before the opening of the succeeding season?
A. He made the proposition.
Q. That was what you were trying to accomplish?
A. That was not what I went there for in the first instance.
Q. Mr. Deming told you that under no circumstances would he agree to take the salmon in January or February, 1908, the unsold portion of them, at the opening price?
A. Mr. Deming agreed to take the whole pack.
Q. Didn't he tell you he would not agree to that?
A. No sir.

Q. Didn't he tell you he had an opportunity to purchase Alaska Reds, Alaska Red salmon on a similar basis and would not do it, although he desired to handle Alaska Reds more than any other, but he would not take them that way?

A. No sir, he did not.

Q. He said nothing like that?

A. No sir.

Q. Not of a similar character?

A. The Kelley-Clarke Company of Seattle——

Q. I am not asking you about that: I am asking what Mr. Deming and you said, is that not a fact?

A. No sir.

Q. Did not Mr. Deming also tell you that he would give you the option on the arrival of the first of February as to the unsold salmon, if any salmon was unsold at that time, he would take them off your hands and pay you for them at the then market price, but

156 you could hold them if you wanted to?

A. No sir.

Q. Provided always he should have the privilege of selling the salmon when he got ready to sell them on a basis of 1½ and 5% discount and commission, did he not tell you that?

A. No sir, he did not.

Q. Do you mean to state that Mr. Deming never discussed with you in any way the taking of your salmon unsold on the first of February at the market price?

A. He did not.

Q. Or at a price to be agreed upon?

A. He did not. He knew I was a business man, and he did not think of doing that: he would not make a proposition to me like that.

Q. Yet, Mr. Deming in the month of February, 1907, agreed to take them at the opening price, the opening price to be fixed in August or September, and take those salmon a year later at the price to be fixed in the month of August or September preceding, that was what he agreed?

A. He agreed to take the pack of 1907 at the opening prices and any that remained unsold on the first of February, 1908 to pay for them.

Q. You mean to tell this jury that in the month of February, 1907, Mr. Deming agreed to take all of your unsold pack the following February at a price to be fixed six months later than the date of this contract?

A. Yes sir.

Q. That was the agreement?

A. Yes sir.

Q. That was a fine business proposition too, wasn't it?

A. It was not any better than I might have made with others.

Q. You might have made it with others?

157 A. He had my salmon under his control at all times. I never had a chance to sell a case of that salmon.

Q. After you had made a contract with Mr. Deming to sell on a commission basis you would have no right to sell to anybody else?

A. I paid his commissions.

Q. In every such contract, the custom was in handling salmon to pay 5% commission brokerage, and 1½% discount, you turned over your entire pack to some salmon broker and you had no right to sell that salmon at all; you have no right to sell the salmon under any condition when you put it in the hands of a broker, you give him the exclusive sale?

A. Not always.

Q. Ordinarily you give him the exclusive sale?

A. If he finances me, I do, if he does not I don't.

Q. You give to every broker the exclusive sale of your salmon, do you not?

A. Not unless he finances me.

Q. What is the custom on the Sound as you testified to? You put it in the hands of a broker to sell on a commission basis, and you have to pay that commission in any event, do you not?

A. Provided the broker finances the pack, if he does not there would be no sense in turning it over to one broker.

Q. It is usual and customary on the Sound for each canneryman to have only one broker, is it not?

A. Because he finances them.

Q. Whether he finances them or not?

A. I do not think so.

Q. You know that is a fact: every canneryman has one broker and he gives the broker the exclusive sale of his salmon?

A. That is why we pay them 5% because they finance us.

Q. That is the custom is it not, generally?

158 A. It is the custom for the broker to finance the packer if he has the exclusive sale.

Q. Do you know of the pack of 1908 or 1909, who financed the packs, whether the broker financed the packs of any canneryman that you know of?

A. The Carlisle Packing Company's pack.

Q. The broker financed the Carlisle Packing Company for 1909?

A. Yes sir.

Q. You do not know of any other; Was Mr. Welsh's pack so financed?

A. I do not know anything about the other packers' business; I know about my own.

Q. Then when you state what was customary you are referring to what is customary with you?

A. A great many others, because I have discussed it with the brokers who they financed and who they did not.

Q. After the conversation referred to in Mr. Deming's office—I want to go back to that—after that conversation you went on and got your cans from the Pacific American Fisheries, is that right, for that season?

A. Yes sir.

Q. And you stated Saturday in answer to one of Mr. Davis'

questions that they did not give you the tall cans, but required you to take the flats?

A. Yes sir.

Q. Did you have a written contract with the Pacific American Fisheries for those cans?

A. I did.

Q. Did they furnish you all of the tall cans that they agreed to furnish you in writing in their contract?

A. They made that contract for so many cans and in addition to that they were to supply me with what cans I might need for the season. I wanted the tall cans and I could not get them;

159 they gave me the flats.

Q. That contract was in writing and it states what you said, does it? Now, as a matter of fact, did not the contract provide that they should sell you 120,000 tall cans with the privilege of taking 120,000 more if needed by you, and did they not furnish you 720 thousand tall cans?

A. They furnished me enough for 41,000 cases.

Q. Did they not furnish you 720,000 tall cans when that contract in writing provided for the supplying of 240,000?

A. I think you will find that contract——

Q. I will call your attention to the contract, and ask if they did not supply you under that contract with 720,000 when they only agreed to furnish you 120,000, in the first instance and 120,000 later on if you needed them? (Counsel hands witness contract.)

A. That is something I cannot find in this contract.

Q. That is your signature?

A. There seems to be something left out some place.

Q. What you stated is not in there, is it?

A. This is not all of that contract.

Q. Is that not your signature to the contract?

A. Yes.

Q. And there is no such statement in there that you just made, that they must furnish all the tall cans required for the pack?

A. I do not see that.

Q. What did you say?

A. What cans we might require to put our pack in.

Q. It is not there, is it? That contract provides that they shall furnish you 120,000 tall cans and 120,000 tall cans more if you need them, is that not right?

A. It may be.

160 Q. Not only that, but during that year they furnished you 720,000 tall cans, didn't they?

A. Yes, that must be.

Q. In other words they furnished you one-half more cans than they agreed to furnish you under that contract, of tall cans?

A. I do not know the figures; I know they supplied us with 41,000 cases of cans.

Q. And yet you testify that you have been damaged because they did not furnish you tall cans, but that you were forced to take the flat cans?

Mr. DORR: I object to that.

A. I can explain if the judge will allow me.

Q. Yet, you say this is not the contract, that something was left out?

A. It was not a form contract, I did not look it over much; it was so long I did not read it.

Q. In other words this contract does not speak the truth as to the agreement which you made, in other words it is different to the contract you made as to your cans?

A. It is different to the contract I had before, the year before.

Q. I am asking if this contract made the 21st day of February, 1907 is not different from what you thought it was when you were testifying a moment ago, you thought it included something that was not in it?

A. Mr. Deming was very glad to sell me the cans.

Q. You answer my question, if you can. As a matter of fact this contract is not the contract you thought it was?

A. It is the same contract I thought it was. In the old contract the old can contract that was the way it was worded and I forgot it was not worded the same as those. Mr. Deming drew that contract and I did not look it over very carefully because he had agreed to furnish me the cans.

161 Q. In other words, there was another contract made, which was different to this contract?

A. He said as long as he bought the fish it did not make any difference what kind of cans he gave me.

Q. As a matter of fact you stated, and state now, the agreement you had with Mr. Deming in regard to the purchase of cans is entirely different from the written contract which has been shown here?

A. Not very much.

Q. The part was left out in regard to furnishing you all the cans you needed for the pack?

A. Yes sir.

(Defendants' exhibit A marked for identification.)

Mr. MCCORD: I now offer in evidence defendants' identified exhibit A as a part of this cross-examination.

Mr. DORR: No objection.

The COURT: It may be admitted.

Q. I also hand you a statement showing the number of cans delivered and ask if 735,000 cans is not the approximate amount you received?

A. I guess so.

Q. I will ask you who you made this contract with: I mean the contract for the sale of your fish?

A. E. B. Deming.

Q. You made the contract with E. B. Deming as the man you negotiated the contract with, but the party making it, the party

you made it with, was Deming-Gould Company of Chicago, fish brokers, to handle your pack?

A. I understood it was Deming-Gould Company buying it.

Q. As a matter of fact in July, 1908 you notified Deming-Gould Company through Dorr & Hadley, then acting as your attorneys, that you would hold them responsible for this damage?

162 A. Yes sir.

(Defendants' exhibits B and C marked for identification.)

Q. I call your attention to defendants' exhibit B and ask you if that is the letter to which you referred in your direct examination?

A. Yes sir.

Mr. McCORD: I offer in evidence as a part of this witness's cross-examination defendants' identified exhibit B, which is a letter from the Carlisle Packing Company to Deming-Gould Company, under date of July 2, 1908.

Mr. DORR: No objection.

The COURT: It may be admitted.

Q. Then, as a matter of fact, your contract, while made through the instrumentality of Mr. E. B. Deming, was in fact made with Deming-Gould Company for handling these salmon?

A. I had no way of knowing that except from what was told to me.

Q. He told you it was for the Deming-Gould Company?

A. I think I understood—I would not be quite sure about it.

Q. As a matter of fact on July 2, 1908, 15 months afterwards you thought so to the extent of writing Deming-Gould Company a letter demanding that they pay you the damages?

A. Yes sir.

Q. You thought so during that entire period of time and you knew that Deming-Gould Company were engaged in the salmon brokerage business in the city of Chicago, did you not?

A. I knew that Mr. Deming represented the Pacific American Fisheries and Deming-Gould Company, and I was not quite clear which one he was representing in this instance, but I think it was the Deming-Gould Company.

Q. I will ask you if, as a matter of fact, you did not know that Deming-Gould Company was engaged in the salmon brokerage business and in that business they were handling salmon?

163 A. Yes sir.

Q. And you knew what you were after, and what you were making the contract for was to get somebody to sell your pack?

A. Not to sell my pack, to buy my pack.

Q. You wanted somebody to sell your goods and give you the money up until the first of February, 1908.

A. I wanted to make the best deal I could.

Q. And you made it with Deming-Gould Company as shown by your letter?

A. With E. B. Deming. I do not know whether it was with the Deming-Gould Company or not.

Q. You say to the best of your knowledge it was with Deming-Gould Company?

A. Yes, I understood it was, I do not know whether Mr. Deming said so or not, or whether I took it for granted, but I did understand it that way.

Q. And he understood he was dealing for Deming-Gould Company?

A. I do not know.

Q. You said he told you so?

A. I do not know whether he did or not.

Q. There is no question that that contract was made, the contract for the sale of this salmon, between the Carlisle Packing Company and Deming-Gould Company?

A. The Pacific American Fisheries took part of our pack.

Q. I am asking about the contract made for the sale of these goods; there is no question as to the contract having been made between the Carlisle Packing Company on the one part and Deming-Gould Company on the other part?

A. I understood it was about that way.

Q. There is no doubt in your mind but that was the party you were dealing with at that time?

164 A. I understood that, yes sir.

Q. I just want to ask about another letter. I call your attention to defendants' identified exhibit C and ask if that was the letter with which the exhibit B was transmitted?

A. Yes sir.

Mr. McCORD: I offer in evidence defendants' identified Exhibit C.

Mr. DORR: No objection.

The COURT: It may be admitted.

Q. You made the statement that these fish were to be taken from time to time on pro-rata orders, and from the time of the opening price, and drafts were to be drawn, I will ask you on whom those drafts were drawn on the goods that were sent out?

A. Deming-Gould Company, but the Pacific American Fisheries bought some of the salmon and the Pacific American Fisheries paid for them.

Q. What portion did they pay for?

A. Some sockeyes.

Q. They bought some later on; in other words you did not sell them you could not sell them, the Deming-Gould Company sold the Pacific American Fisheries?

A. Yes sir.

Q. And the Pacific American Fisheries paid this money to Deming—that check of the Pacific American Fisheries was simply a matter of convenience—Deming-Gould Company sold to them, you did not sell to the Pacific American Fisheries?

A. No sir.

Q. And if they bought them it was like any other customer buying them and paying for them?

A. I suppose they bought them through the Deming-Gould Company.

Q. The Pacific American Fisheries never bought any directly from you?

A. No sir.

165 Q. They paid for them and you got the checks?

A. I did not know because one man was manager for both companies and when he ordered me to ship them I did.

Q. When he ordered them shipped anywhere else you shipped them also?

A. Yes sir.

Q. But you were not selling to these other parties?

A. No sir.

Q. There was no difference in the Pacific American Fisheries taking the fish and some other house taking them; in other words, your dealings with the Pacific American Fisheries and your delivery of the salmon to them came only through the brokerage business with Deming-Gould Company?

A. They came through the Deming-Gould Company, I suppose.

Q. As you had sold to Deming-Gould Company in February as you state, you could not have sold the goods directly to the Pacific American Fisheries without violating your contract?

A. Not without Mr. Deming had ordered it.

Q. Therefore, if you made your contract as you say with the Deming-Gould Company they were the only persons who had any legal right to sell the salmon; you had deprived yourself of that right?

A. It would be E. B. Deming.

Q. He would be selling them through the Deming-Gould Company as vice-president of that company, wouldn't he?

A. I had no way of knowing that.

Q. Let us understand each other, and be fair about it and frank; you understand you sold these goods to the Deming-Gould Company, you say you had no right to sell them to anybody else and you couldn't sell them to anybody else, the goods that were turned over to the Pacific American Fisheries, you did not sell them to the Pacific American Fisheries, but you sold them to Deming-

166 Gould Company, and they sold them?

A. Mr. Deming ordered the goods out, and if he had ordered them shipped to anybody else we should have done so.

Q. You are not answering my question.

Mr. DORR: I object to the question as calling for a legal conclusion.

The COURT: Tell what was said and done. I think he should first be called upon to give the substance of these conversations had with parties.

Q. I will ask you to state any conversation you had with the Pacific American Fisheries or anybody representing that company by which you were to sell them any salmon?

A. Mr. Deming explained to me that they were going to hold so

many cases of sock eyes, they were not going to sell them, for 1907, and believing our pack as good as theirs and their pack being in the Pacific American Warehouse over the water they would take my pack and hold it in their warehouse.

Q. That was for the Pacific American Fisheries?

A. He was talking for the Pacific American Fisheries then.

Q. You do not pretend that Mr. Deming bought any of your salmon individually?

A. I do not know who he bought it for, but he bought it.

Q. You said he never bought any for himself?

A. I suppose he was acting for the Deming-Gould Company.

Q. Did he ever give any personal checks for these salmon?

A. No sir. The Deming-Gould Company did and the Pacific American Fisheries.

Q. You did not sell any to him, you never got any money from him personally?

A. No sir.

Q. In referring to Mr. Deming you referred to him in his
167 representative capactiy as the president of these various corporations?

A. Yes sir.

Q. I will call your attention to plaintiff's identified exhibit 21 which purports to be a statement rendered by the Bellingham Warehouse Company to the Carlisle Packing Company under date of August 1, 1909, for $1706.84?

A. Yes sir.

Q. I will ask you particularly what portion—you never paid to the warehouse company any warehouse charges prior to that date, did you?

A. We paid them something, but I do not remember what it was, whether it was on this salmon or not, I am not sure. It does not amount to very much any way.

Q. Prior to February 1, 1908, you had your sock eye salmon and your tall pinks and flat pinks all stored in that warehouse, did you not?

A. Yes sir.

Q. And how many cases were there all told, pinks?

A. I do not remember the number.

Q. About how many, approximately?

A. Ten thousand cases.

Q. And how many sockeyes?

A. I do not know.

Q. About how many, 20,000 cases?

A. No, we only had 9 in the first place.

Q. About how many?

A. I do not just remember how many of those sock eyes there were, because they were supposed to be paid for.

Q. This bill of $1706.84 covers the entire charges for storage and for insurance on all of the salmon from the time it was delivered into the warehouse up until the time that it was finally paid
168 for, when the last was taken out?

A. No.

Q. I noticed there one item, insurance on December 7th storage on October 28th, 1907, I want to know if this bill does not include the entire warehouse and insurance charges upon all of your salmon from the time it went into the warehouse until the last of it was taken out?

A. Not as I understand it.

Q. Show me from that statement? (Hands witness statement.)

A. As I understand it all charges for insurance and storage were paid up to February 5th.

Q. Testify from those statements, not what you understand. Look over the memorandum and tell me if you can?

A. That $1700 is a balance that was due, we owed more than that on the whole storage.

Q. You paid separately on the salmon stored for that period. Is that part of the insurance and storage earned up to and including February 5, 1908?

A. My understanding is the storage was all paid up to the 5th of February and some insurance.

Q. What you are saying now is this bill includes the storage on the salmon that was left over from February 1, 1908, up to the time it was paid, is that right?

A. I did not understand that.

Q. I say, this bill then of $1700 is what you claim to be the storage and insurance charges from February 5, 1908, down to the time it was finally paid upon all of the salmon that was left in the warehouse, only from February 5th?

A. That is as I understand it.

Q. That is what you mean by testifying you paid this out on this salmon?

169 A. Yes sir.

Q. That is what you intended to testify to?

A. Yes sir that is as I understand it.

Q. If, as a matter of fact, ½ or ¼ of this item was made up of storage that accrued prior to February 5th, you are not taking that into account in testifying?

A. I did not figure that, I had my bookkeeper figure it.

Q. If there is anything prior to that time on this salmon included in this bill, that ought to be deducted, ought it not?

A. Yes sir, there should not be any storage on it until the first of February.

Q. It ought not to be included in here?

A. No. Not in that bill.

Q. In other words, the amount of the bill $1706.84 should be reduced by the amount of storage and insurance that had accumulated prior to February 1st?

A. Yes sir.

Q. Now, as a matter of fact, there was a large part of your salmon—the sockeyes were all sold, were they not, and paid for, on the 5th of February?

A. Yes sir.

Q. The balance of them were paid for?

A. Yes sir.

Q. Including both the talls and flats and half flats?

A. Yes sir.

Q. Did you have any conversation with Mr. Deming in regard to the half flats, sockeyes, along in September, the first of September, in regard to the sale of them?

A. I think those were the ones that he put in the warehouse to hold.

Q. You went to him, did you not, about the time the opening price of salmon was made, and wanted him to sell those,
170 didn't you—before the opening price—at $1.00 a dozen?

A. He told me at the opening or a few days after the opening that all the sockeyes were sold and they were short.

Q. You wanted him to sell just before the opening at $1.00 a dozen?

A. It is not likely that year, they were at a premium.

Q. You thought it was a good thing to sell for $1.00 a dozen?

A. No sir.

Q. And he told you no, not to do it?

A. I prepared for 20,000 cases and got 9.

Q. Before the pack was finished you wanted to sell these flats at $1.00 a dozen?

A. It is not likely.

Q. And Mr. Deming told you to hold on and you would certainly get much more than that?

A. I did that with Mr. Deming once, but I would not do it again; I lost $2,000.00 that time.

Q. You didn't do it this time?

A. No sir.

Q. You said something in your direct examination about the storage of certain salmon that was put in there that would be taken out pretty soon and that you would not have to pay any storage on it or insurance?

A. He advised me to move the pack over there as the time was so short there would not be any storage, that it would be taken up the first of February.

Q. When did he tell you that?

A. Before he went to Chicago, along before the panic.

Q. Before the panic of 1907 you mean?

A. 1908.

Q. Was that a part of your original contract in March or February?

A. I do not understand your question.

171 Q. Was anything said at the time you made the contract for the disposition of your salmon in February or March, 1907, by which you should not be charged for storage?

A. Not in the original contract, no.

Q. Later on he told you there would be no storage?

A. It was the balance of the pack——

Q. About what time was that?

A. It would be about 60 days—about the first of December, somewhere along there, I suppose.

Q. And at that very time you continued to put your salmon in the Bellingham Warehouse Company's warehouse, took its receipts in which you agreed to pay storage at the rate of 25 cents per thousand per month and agreed to pay the insurance and accepted those warehouse receipts right along?

A. Yes sir.

Q. And yet you are charging up, or trying to, I mean, the Deming-Gould Company with the storage before there was any attempted breach of your contract?

A. Not before the first of February.

(Defendants' exhibit D marked for identification ).

Q. I want to call your attention to defendants' identified exhibit D, purporting to be a Bellingham Warehouse Company's warehouse receipt, dated December 9, 1907, issued by the Bellingham Warehouse Company to the Carlisle Packing Company and ask if that was one of the warehouse receipts that your company received and look on the back of it and see if your endorsement is there?

A. Yes sir.

Q. All of your salmon was in the warehouse under similar receipts to that?

A. Yes sir.

Q. Each one of them providing for insurance and storage?

172 A. Yes sir.

(Defendants' exhibits E and F marked for identification.)

Q. I call your attention to defendants' identified exhibits D, E and F, being warehouse receipts and ask you if those were among the warehouse receipts from the Bellingham Warehouse Company?

A. Yes sir.

Q. And these warehouse receipts when issued to you were taken to the First National Bank were they not—I offer these exhibits in evidence.

Mr. DORR: No objection.

The COURT: They may be admitted.

Q. They were subsequently taken to the First National Bank?

A. Yes sir.

Q. What about the item of $52,000.00, what about that; what was that for?

A. It wasn't $52,000.00, it was $51,000.00 and something, that was for——

Q. That included what items, what sort of salmon?

A. Thirty-two thousand dollars' worth of sock eyes, which there was a check written for and afterwards withheld, and then the balance of the pack.

Q. When was that $32,00.00 check drawn and withheld; what do you mean by that?

A. Mr. Deming had taken that much salmon on account of the Pacific American Fisheries.

Q. How much was that?

A. I think $32,000.00.

Q. When was that check given?

A. It was given on or about the first day of the panic. I do not just remember the date.

Q. Did you have the check?

173 A. No, I did not get the check.

Q. I thought you said the check was given and withdrawn?

A. The check was signed——

Q. Did you see it?

A. No sir, his bookkeeper told me.

Mr. McCORD: I move to strike that now.

A. Mr. Deming told me he would write it.

Q. You never saw the check?

A. No sir, but I saw the telegram——

Q. Never mind about the telegram. That was about the 23d of October wasn't it?

A. Yes sir, somewhere along about that time.

Q. The balance was made up of what items?

A. Tall pinks.

Q. Tall cohoes?

A. Yes, I think some Cohoes, the balance of the pack down to 10,000 cases.

Q. When was this $52,000.00 paid?

A. The 5th of February.

Q. That was paid by Deming-Gould Company?

A. I think so.

Q. That was paid into the First National Bank by Deming-Gould Company?

A. I am not sure, but I suppose so.

Q. Mr. E. B. Deming did not pay it in, or the Pacific American Fisheries?

A. It must have been Deming-Gould Company. He paid it in, I did not see the check.

Q. But it was Deming-Gould's check as far as you know?

A. I do not know that it wasn't.

Q. That was on the 5th of February, you say?

174 A. Yes sir.

Q. As a matter of fact that was a Deming-Gould Company check, was it not?

A. I do not believe that I ever saw the check; I think the check was paid into the First National Bank and the warehouse receipts taken up; I do not think I saw it.

Q. You do not know then?

A. No sir.

Q. Then when you stated in direct examination that was a Pacific American Fisheries check you did not mean that, or I misunderstood you?

A. I did not mean to say it was a Pacific American Fisheries check, no sir.

Q. You do not know whether it was a Deming-Gould check or not?

A. No, I know that Mr. Deming paid the money to the bank, but I do not know whose check it was, because I do not think I saw it.

Q. Along about the 5th of February you referred to a conversation you had in the First National Bank of Bellingham, did you not, with Mr. Deming?

A. Yes sir.

Q. You had rather a stormy session, did you not?

A. Yes sir, we did.

Q. You say that was the first time you found out there was a misunderstanding about this salmon?

A. Yes sir.

Q. It never had been mentioned before that time or discussed by you or Mr. Deming?

A. I was over at his office about 30 minutes before and I understood before I left that he was going to take it, and I came over and told Mr. Purdy he was going to.

Q. Did Mr. Deming tell you he was going to take these
175 salmon?

A. He said if I made it possible for him to get the money to pay me he would do it.

Q. When was that conversation?

A. When I went to see him about the balance of the payment.

Q. When was that?

A. The 5th of February.

Q. Where was that?

A. At Mr. Deming's office in South Bellingham. And he said it was impossible to get the money, he said it was impossible to get blood out of a stone.

Q. That was on the 5th of February?

A. Yes Sir.

Q. On the same 5th of February that he paid you $52,000.00?

A. Yes sir, the same day, 30 minutes afterwards or an hour afterwards. I asked him when he said he could not get any money, if I would make it possible for him to get it if he would pay me and he said that was what he wanted to do, when I went over and met Mr. Purdy and Mr. Purdy agreed——

Q. Never mind that, that is not proper.

A. I made arrangements to get the money, anyway.

Q. What time in the day was this conversation had over in the bank with Mr. Deming?

A. Just before lunch, I think.

Q. On that occasion you discussed the balance on the contract in regard to these salmon and Mr. Deming told you he never had bought the pink salmon or the sockeyes under the arrangement you claimed?

A. No sir, he just refused to take the pink salmon.

Q. To take the entire pack of salmon?

A. Yes sir.

Q. He would take the tall salmon at 80 cents a dozen, would he not?

A. Yes sir.

176 Q. And then was when he offered you 80 cents for the flats?

A. Yes sir, at the final settlement.

Q. But he had refused to take the pink talls up to that time, you say, on the 5th of February, he said he had no contract and refused to take them?

A. He agreed to take the talls.

Q. When?

A. Right there in Mr. Purdy's bank; he refused to take the flats but agreed to take the talls.

Q. And he agreed to take the talls by way of compromise or settlement?

A. No sir.

Q. He agreed to take the talls anyway and agreed to take the flats at 80 cents; did he not say he would take the talls in order to settle the controversy?

A. No sir.

Q. As a matter of fact did he not tell you that, and did not Mr. Purdy tell you that later on?

A. No sir.

Q. Did Mr. Purdy not come to you and tell you Mr. Deming said he would take the talls, although he had not agreed to, in order to settle the matter?

A. The whole controversy was over the flat pinks.

Q. Did not Mr. Purdy come to you and tell you that?

A. No sir.

Q. And didn't Mr. Purdy——

A. Mr. Purdy was present at this conversation.

Q. Mr. Purdy was present during the whole of that conversation?

A. He was just right outside.

Q. You know that he did not hear the conversation?

A. I think he did. He told me everybody in the bank heard it.

177 Q. Did he not tell you recently that he never heard the conversation?

A. No, he told me just recently everybody in the bank heard it.

Q. Did he say he heard it?

A. He said everybody in the bank heard it and he was there.

Q. Did not Mr. Purdy, representing you, go to Mr. Deming later on after the 5th of February or after this conversation, possibly on the same day and say if he would take the tall pinks at 80 cents a dozen you would call the whole matter settled?

A. No sir.

Q. Did not Mr. Purdy tell you that?

A. No sir, because they were paid for.

Q. When you walked out of the bank after this conversation with Mr. Deming there had been nothing said by Mr. Deming which would lead you to say he was going to take the tall pinks?

A. I think they were paid for before I left the bank.

Q. You are as certain of that as you are of the balance of your testimony?

Q. If they were not paid for he had agreed with Mr. Purdy in my presence to take them and had agreed to give him a check for that amount of money, $51,000.00 and some dollars.

Q. The buying of these sockeye salmon as you stated a moment ago was a separate agreement that was made before. He agreed to take them over in August or September?

A. There was no other agreement.

Q. In fact the agreement you made in March, 1907 remained as it was until along in October, 1907, and at that time you and Mr. Deming made a modification of that agreement as to the sockeye salmon?

A. No, sir, about the first of September he told me the sockeye salmon was all sold, and I said if they are all sold why don't you take them and pay for them or give me shipping instructions?

Q. You know they were not all sold notwithstanding he told you they had been, because when Mr. Deming went to
178 Chicago did you not send him a telegram urging him to take the sockeye salmon or at least to give you pro-rata orders?

A. He came to me afterwards to make the arrangement to store part of our salmon instead of storing part of the Pacific American's.

Q. On November 9th, did you not wire Mr. Deming at Chicago as follows: "Why don't you pay for the sockeyes as agreed and give me reasonable proportion orders. Men laid off and not paid. Answer quick. Very important" Did you not send that telegram?

A. I think I did.

Q. What did you mean by saying Why do you not pay for sockeyes as agreed?

A. He had taken the sockeye salmon and I had no warehouse receipts or anything else for the salmon. I asked for a credit memorandum for them and he refused. He had agreed to pay for them, had taken them and had them in his possession.

Q. You mean in the possession of the Bellingham Warehouse Company?

A. No sir, the Pacific American Fisheries.

Q. Where was the goods stored?

A. They went to the Bellingham Warehouse Company's warehouse.

Q. And you had the warehouse receipts for them?

A. No sir.

Q. For the sockeyes?

A. No sir, I did not have anything.

Q. Then your telegram referred to some agreement with reference to the sockeyes, you say he had agreed to take those sockeyes? He did not agree to take the sockeyes on November, 1907?

A. My telegram referred to what he owed. I asked the bookkeeper to give me a credit memorandum and he refused to give me that.

Q. As a matter of fact when you sent that telegram on November

9th and asked why he did not take them and pay for them,
179 you referred to some agreement after your original contract in March?

A. No sir, there was no subsequent agreement. He took them and owed me for them.

Q. As a matter of fact you must have referred to some other conversation in which Mr. Deming had agreed to take your sockeye salmon, did you not?

A. He simply ordered them shipped to the Pacific American Fisheries.

Q. As a matter of fact, just before Mr. Deming went East did you not make an arrangement with him by which he was to take over your sockeyes and was not that a separate agreement?

A. He ordered them out. They would send orders over to the Carlisle Packing Company with orders to put a certain label on 600 cases or a car load of salmon and ship them. He sent over orders or telephoned over orders to ship those sock eye salmon and he would pay for them because he told me on the first of September they were all sold; then if they were all sold I wanted the money within a reasonable time.

Q. But Mr. Deming was under no obligation under your contract of March, 1907 to take the salmon if they were not sold?

A. Yes sir, if he pro-rated our salmon with the Pacific American Fisheries they were all sold and he had a right to take them and pay for them.

Q. You mean to tell me, then, there was no contract, no modification of this contract, no arrangement by which Mr. Deming or the Pacific American Fisheries was to take over any portion of your sockeye salmon, but you referred in your telegram in your demand for money to the fact that he had told you he had sold them to other parties?

A. He had sold them to the Pacific American Fisheries and the Pacific American Fisheries owed them and it was the Pacific American Fisheries I was telegraphing to pay me, not Deming-Gould.

180 A. And you were not telegraphing Deming-Gould Company?

A. No sir.

Q. That referred only to the sockeye salmon?

A. And I believe some other salmon that had been shipped out.

Q. That was all subsequently paid for?

A. On the 5th day of February.

Q. The sockeye salmon were all paid for?

A. Some salmon he sold——

Q. Now, Mr. Wright, you knew that this sockeye salmon you say had been sold by Deming-Gould Company to the Pacific American Fisheries, and that you sent the telegram to the Pacific American Fisheries and wanted them to pay the money after having purchased the stock from Deming-Gould?

A. I sent it to E. B. Deming, I remember that.

Q. You said you sent it to the Pacific American Fisheries and wanted the Pacific American Fisheries to pay for them?

A. Mr. Deming had told me he would sign a check and the bookkeeper told me he did sign a check for $32,000.00 for those salmon.

Q. But you never got that check?

A. No sir, but the bookkeeper showed me the telegram that Mr. Deming sent from the train after he left for Chicago to hold the check and I asked the bookkeeper to give me a credit memorandum and he would not do it.

Q. You were looking to the Pacific American Fisheries for that money and not Deming-Gould Company?

A. I was looking to Mr. Deming. Mr. Deming told me that he would give me a Pacific American Check for that money.

Q. Was it a Pacific American Fisheries check or somebody else's check?

Mr. BRUCE: That was answered by the last answer.

A. Mr. Deming told me he would give me a Pacific Amer-
181 ican Fisheries check for the salmon delivered.

Q. That was what you meant in the telegram?

A. Yes sir.

Q. You never saw any such check?

A. I saw the telegram, I did not see the check.

Q. What was that telegram?

A. To hold the check; hold the Carlisle Packing Company check, I think that was it.

Q. What was the date of that telegram?

A. That would be about the first start of the panic whenever that was, within a few days.

Q. Instead of saying to hold that check, the telegram that Mr. Deming sent, which you saw, was to withhold payment of all checks on account of the panic, was it not?

A. No sir.

Q. Did it not state that on account of the panic conditions nobody could get any money?

A. No sir, it just referred to this check.

Q. But you knew you could not get any money anywhere at that time?

A. No sir, not that day. I knew it within 24 hours, but not that day.

Q. You say on February 1st or February 5, 1908, Mr. Deming, or Deming-Gould Company, refused to take these salmon. Did you notify him then that you were going to sell the salmon?

A. You bet I did.

Q. You told him you were going to sell them right then? Then, why did you on the second of July notify them as you did in writing you were going to sell the salmon?

A. I had been trying from the 5th of February up to that date to get a reasonable offer for the salmon and I had not been able to get an offer of any kind up to that time. Before I sold it I notified them.

182 Q. As a matter of fact, Mr. Deming had made you this offer of 80 cents a dozen on this same fish had he not?

A. No sir, not unconditionally—conditioned upon a settlement then.

Q. Wasn't it absolutely without condition, he said he would give you 80 cents a dozen for the fish although he never agreed to take them?

A. No sir.

Q. You will make that statement, that he did not tell you that?

A. He made it conditionally.

Q. Did you make any effort to sell that salmon between that time and the 2nd of July?

A. Yes sir, I never overlooked an opportunity. I sent out samples, wrote to different dealers and sent telegrams.

Q. This is the first notice, July 2, that you gave to Deming-Gould or to anybody else?

A. I was unable to get a reasonable offer up to that time for any salmon.

Q. That is the first notice you gave to the Deming-Gould Company that you were going to sell these salmon?

A. After the 5th of February; I notified them the 5th of February.

Q. From the 5th of February until the 2nd of July you gave no notice, you did not give any further notice?

A. It was impossible to do anything.

Q. If the salmon had gone up between the 5th of February and the 2nd of July you would have sold them and taken the profit on the advance?

A. No sir, if they had gone up Mr. Deming would have sold them.

Q. If the price had gone up from 80 cents to $1.00 you would have sold them and kept the profit. You took the goods yourself and never elected or determined to give him any notice until July 2nd?

A. Not until I had an opportunity to sell something.

183 Q. In other words, you did not know what you were going to do until about the 2nd of July?

A. I knew all the time.

Q. You knew you were going to sell the goods?

A. Yes sir.

Q. And if you had sold them for more than 90 cents a dozen you would have kept the difference?

A. Mr. Deming would have sold them.

Q. You would have taken the benefit of the rise, wouldn't you?

A. No sir.

Q. And you expected the salmon to go right on up, did you not?

A. No sir.

Q. At that time?

A. No sir, there was no question about that; they were going down all the time.

Q. They were going down all the time—were they worth more on the 5th of February than on the 2nd of July?

A. I think so.

Q. What were they worth on July 2, could they have been sold then for 80 cents a dozen?

A. I doubt whether they could or not, that quantity of flat pinks, but tall pinks could have been I think.

Q. Could flat pinks have been sold at 75 cents a dozen on July 2?

A. I know 6,000 cases that were sold on July 2.

Q. I will ask about February 5th, could you have sold them at 75 cents a dozen?

A. I do not believe I could have sold them at all.

Q. Did you say the price of fish was higher on February 5th than on July 1st?

A. The price and what you could get was a different thing; they were holding the price up, but were not selling any.

184 Q. As a matter of fact, you could have sold those salmon on February 5 on the open market for 80 cents?

A. No sir, I do not believe I could have sold 600 cases for 50 cents a dozen.

Q. But the market price was quoted at 80 cents—was it quoted higher than 80 cents, the price quoted among the brokers, was it more than 80 cents a dozen between February 5th and July 2, 1908?

A. No, I do not think so.

Q. As a matter of fact, you know that on February 1, 1908, you could have sold that pack of salmon, that pink salmon, for more than you got for it later?

A. I could not have sold it — any price at that time.

Q. You could have sold it at 80 cents a dozen to Mr. Deming at that time?

A. I do not know about that. He said that at one stage of the conversation, that he would give 80 cents for it, but that was contingent; that was in settlement of the full claim.

Q. In settlement of the entire claim?

A. Yes sir.

Q. In other words you would have realized at 80 cents a dozen about $8,000 more money than you got out of the salmon, wouldn't you?

A. But I had sold my salmon for 90 cents and why should I sell for 80 cents a dozen?

Q. Mr. Deming contended at that time, on February 5th, that he never bought your salmon at all, but that he would give you 80 cents for the flat pink salmon?

A. He did not deny having bought them but refused to take them.

Q. Didn't he tell you he never had had any such agreement in the world with you?

A. Not to me, he refused to take them.

185 Q. Didn't he say to you the reason he would not take them was that he had never agreed to take them in the world?

A. No, he did not say that to me.

Q. Except at the market price, and did he not tell you at that time that the market price was about 80 cents a dozen, and that

he would pay for them at 80 cents a dozen as he agreed to take them at the market price, and even if that was a little more than they were worth, if they were worth a little less than 80 cents he would pay you 80 cents, did he not tell you that?

A. No sir.

Q. You will say he did not make any such statement as that to you in Mr. Purdy's bank on February 5th?

A. At one time in the conversation he said he would take the pinks at 80 cents, but that was all that was said at that time, as I remember it, but that was in full settlement of the claims.

Q. He said there was no liability in any way, he did not care anything about that, but he said he had agreed to take the salmon and pay for them on February 1st at the market price, but he said he would give you 80 cents for the talls and 80 cents for the flats, the flat pinks, in order to show you he was carrying out his agreement with you, is that not it?

A. No sir.

Q. Yet, nevertheless, you do say that Mr. Deming stated he would give you 80 cents for the fish?

A. In full settlement of all claims.

Q. If Mr. Deming was correct in his recollection of your agreement over there, of your contract, that he was to take them at the market price, then when he offered to pay you 80 cents he was offering to pay you more than the market price, wasn't he?

A. He was not paying us as much as the opening price that we sold them for.

186 Q. He was paying you as much as the market price when he offered you 80 cents, or as much as the goods were worth when he offered you 80 cents a dozen; that is the question I want you to answer?

A. I had no way of knowing what the market price was. I had no salmon for sale. I did not have charge of my salmon.

Q. I ask you to state now if Mr. Deming's recollection of the contract made in March, 1907 was that he agreed to take all the salmon that was left on hand on February 1st at the then market price, I will ask you — when he offered you 80 cents a dozen he was not offering you as much as the market price?

A. I do not know I was not in the market then.

Q. Do you know now what the market price was on February 1st?

A. After February 5th, I do know.

Q. Do you know what was the market then?

A. They were holding for 90 cents.

Q. Who was holding for 90 cents?

A. I think Mr. Deming was and Kelley-Clark Company and the Northwestern Fisheries.

Q. All holding for 90 cents?

A I think so.

Q. And held at 90 cents from February 5th clear up to July 2?

A. I do not know, but I do know it was impossible to sell at that price.

Q. You do know they were holding at 90 cents a long time subsequent to February 1st?

A. No, I do not know about that.

Q. Was it six weeks or two months?

A. I do not know, because this was an outlaw pack, and they refused to have anything to do with it at all, to sell it at any price.

Q. You say that salmon brokers held the price at 90 cents a dozen?

187 A. Yes sir, and refused to make any cut on mine because they said they were not in the cut throat business, that was what Mr. Clarke of Kelly-Clarke Company told me when I offered those salmon at a less price.

Q. What did you offer them for to Kelley-Clarke Company?

A. I did not make it in the form of an offer. I wanted him to make me an offer, the highest bid I could get from them, and they would not do it.

Q. Are you prepared now from what you know of the salmon business to state that if Mr. Deming made you an offer of 80 cents per dozen on February 5, 1908 that he offered you any less than the market price?

A. It was ten cents a dozen less than the opening price.

Q. You answer my question, please. I want you to tell me whether or not if Mr. Deming offered you 80 cents a dozen for those salmon on February 5th, he did not offer you as much as the market price?

A. I do not know, because I do not know now what the market price was or what could have been done on that date up to that date.

Q. I say on that date?

A. Shortly after that date the panic was on.

Q. The panic was on 3 months before February. If I remember my sufferings correctly the panic came on about the 20th of October, 1907.

A. Yes sir.

Q. So the panic had been on for 3 months before that time?

A. Yes sir.

Q. Taking into consideration the panic conditions, when he offered you 80 cents a dozen was he not offering all they were worth in the market at that time?

A. Certainly he was.

Q. You think then they were worth 80 cents a dozen?

188 A. I remember I offered them to him for 80 cents a dozen and told him at that time I would bring suit for the balance and he refused to do it.

Q. Who was present when you offered them at 80 cents?

A. I think Mr. Purdy was outside the door of the office.

Q. Were they worth any more than 80 cents a dozen or any less and if so, how much, on February 5th?

A. It was impossible to sell them; there was no market at that time.

Q. You could not sell them at any price?

A. There is twice a year you can sell salmon, one when it is

packed and one in the following May or June and at other times you can hardly sell it at all.

Q. That was a bad time to sell?

A. Yes sir.

Q. Yet the market at that time was held up at 90 cents a dozen by the brokers?

A. Most of the brokers I think; they told me so.

Q. Most of them were holding up, you say?

A. Yes sir.

Q. As far as the market price or value of salmon could be determined by the price fixed by the brokers, 90 cents a dozen was the price for several weeks on from February 1st?

A. Yes sir, but there were no sales.

Q. That is true of the opening price; the opening price is announced shortly after the pack is up?

A. Yes sir.

Q. The fact that the opening price is so much does not mean what salmon is selling for, but what the brokers want?

A. It is supposed to sell at the opening price. My flat sockeyes were worth $1.90 and Mr. Deming took them at $1.80.

189 Q. I say the opening price and the price fixed by the brokers is not always the market price?

A. It was not in the case of those flat pinks.

Q. I am speaking generally; it is not always the market price, but it is the price the brokers are trying to sell the goods for?

A. It is sometimes cut, but it is never cut by the Alaska packers, their agency is supposed to never cut a price, when they make a price they stay with it.

Q. And hold that price straight through for years?

A. They hold that price until the next pack is up. They are the biggest salmon brokers in the world.

Q. After the opening price is fixed by the brokers when the pack is up before any salmon is sold, they come out and announce the price and that is for the purpose of getting buyers; is it not a fact that in 1907 lots of pink flats sold for less than 90 cents?

A. I know of 6,000 cases that were sold for 90 cents a dozen, but I do not know any before the panic that was sold for less than 90 cents.

Q. Do you know that Mr. Welsh that was on the stand sold pink salmon for less than the opening price?

A. No, but I know Mr. Deming told me he sold some for 90 cents.

Q. You heard Mr. Welsh say that he sold some for less than the opening price?

A. Yes sir, he did not say when.

Q. Did he not say right after the opening price was announced?

A. I do not think so.

Q. Is it not a fact that it often occurs that the price named by the Alaska Packers Association or Deming-Gould Company or Kelley-Clarke Company fixes their price?

A. That fixes their price and for those that have no broker.

Q. They sell for what they can get but announce the
190 opening price as what they are going to try to get, and if they cannot get that they sell for less; they sell under the price right straight along??

A. There are a good many things in the salmon business.

Q. Do they not do that? You know the opening price does not mean much except that it is a tentative offer thrown out to see if they will buy at that, and if they do not buy they will sell at whatever it will bring?

A. No sir, only sometimes they get in a fight among themselves, then it might happen.

Q. Have you not sold salmon on many occasions in your experience in the salmon business shortly after the pack is up for less than the announced opening price?

A. Not during the selling season.

Q. What do you mean by the selling season?

A. The latter part of August, September and October, until into November.

Q. You never heard of any salmon during this period of time——

A. I have known of some small packer to cut the price.

Q. The 1907 pink flats—I will ask you if you do not know of your own knowledge of scores of sales that took place below 90 cents—80 cents for the talls and 90 cents for the flats?

A. Not between the date of the opening price and the 5th of February.

Q. But, if, as a matter of fact, they were sold on the opening market for less than the price fixed about the 26th of August, between the 26th of August and the panic, we will say, for less than the opening price, which you say was the market price of salmon, would you say the opening price was the market price, or the price at which it actually sold?

A. The opening price.

191 Q. The price fixed by the brokers?

A. Yes sir.

Q. Then if the price fixed by the brokers in August, 1907, was the opening price and was the market price, why was not the price fixed in February, 1908, why would you not say that was the market price of salmon, where they held them up at 90 cents a dozen?

A. I do not understand you.

Q. You say that regardless of what salmon was sold for the opening price is the market price at the time it is announced after the completion of the pack?

A. Yes sir.

Q. That opening price is the market price regardless of whether some was sold for less than that or not?

A. If one car load sold for less that would not be conclusive.

Q. After February 5th if the price at which the brokers held the salmon was not the market price, why was it not?

A. At that time regarding flat pinks there was no market price, we took what we could get for them.

Q. You said the brokers did not sell salmon for any less than 90

cents a dozen and you would not sell for less than 90 cents a dozen; you thought on February 5th and several weeks afterwards you would get 90 cents a dozen?

A. I had no hopes of getting 90 cents a dozen.

(Whereupon court adjourned until the hour of 1:30 P. M. of the same day at which time court opened according to adjournment, all parties being present as first herein shown, counsel conceding the jury present the trial proceeded.)

Cross-examination of Mr. FRANK WRIGHT by Mr. MCCORD resumed:

Q. Are you a bookkeeper?

A. No sir.

Q. You do not know anything about bookkeeping?

192 A. I know something about books.

Q. You never kept a set of books yourself?

A. Not myself, no.

Q. You have always kept a bookkeeper upon whom you could rely?

A. I did not always rely upon him.

Q. To make the entries?

A. Yes sir.

Q. You may have looked over them to verify the entries but you never kept them yourself or made the entries?

A. No sir.

Q. You have no knowledge as an expert bookkeeper or accountant?

A. No sir.

Q. Then the entries in the books were not made by you?

A. No sir.

Q. You employed men who were supposed to be competent bookkeepers and they kept the books?

A. Yes sir.

Q. You made no entries yourself?

A. No sir.

Q. You cannot take the books yourself and trace out any set of entries from the original entry clear on out?

A. Not without an index.

Q. You cannot do it yourself?

A. Not without an index.

Q. Not without somebody to assist you?

A. Perhaps I would.

Q. Then as far as the correctness of the books is concerned you rely upon your bookkeepers because you employ what you think are competent men to take care of them?

A. In a case of this kind I look over the entries sometimes and have them show them to me.

Q. You cannot take an entry and look it up yourself?

193 A. I do not do that. I have him look the books up and show me.

Q. As far as your knowledge and information goes you are basing your statement on the correctness of the books as a set of books upon what you believe as to the competency of your employees, bookkeepers?

A. Not necessarily.

A. I mean the books as a whole?

A. Yes sir.

Q. You know nothing about the correctness of your books except what you know about your books as a whole?

A. I have my books examined ever- once in a while.

Q. After you had them examined by other people you relied on what they told you?

A. Yes sir.

Q. As far as your own knowledge goes, when you state the books are correctly kept as to your business transactions, you know nothing about it except what your bookkeepers tell you and the experts—I am talking about the books as a whole?

A. Yes sir, that is true.

Mr. McCORD: I believe that is all I care to ask right now.

Redirect examination of Mr. FRANK WRIGHT by Mr. DORR:

Q. You spoke of seeing a telegram in the office of Mr. Deming at Fairhaven with reference to the non-delivery of a certain check, where was that telegram sent from?

A. The Great Northern train.

Q. Whereabouts?

A. It was at some point east of the mountains, I think.

Q. In what state?

A. I am not quite clear whether it was in the state of Washington or not, but I think it was.

Q. Where was Mr. Deming?

194 A. He was on the train bound for Chicago.

Q. From here?

A. Yes sir.

Q. How long was this after he had told you that he would pay the amount?

A. The next day, I think.

Q. Then, do I understand you that you came in to get the check?

A. Yes sir; they telephoned to me the check was there.

Q. Who telephoned you?

A. Mr. Deming.

Mr. McCORD: I move to strike the answer.

A. Mr. Deming telephoned the check was there.

Q. Where were you?

A. I was in Bellingham. When I went to get the check Mr. Brosco was sick, he was not there and I did not see him until next morning, then he had this telegram.

Q. When was it you saw the telegram?

A. The next morning.

Q. About what time was that?
A. I think about 9 o'clock in the morning.
Q. What day and year with reference to the panic?
A. The day before we knew the panic was on.
Q. Do you know what month it was in?
A. November, I think.
Q. Do you have any samples of this style of cans of salmon that were put up by your company, known as talls, flats and half flats?
A. Yes sir.
Q. Will you show them to the jury; explain what each style of package is. (Witness illustrates with cans in hands.)
A. This is a one pound sockeye, which opened in 1907 at $1.65 a dozen.
195 Q. It is the style of can we want explained.
A. That is the tall can; this is the flat, and this the half flat. Those are the three sizes we put up, and this is the style can that those fish were put up in that are in this action, flat pinks.
Q. Were those labeled as this is labeled?
A. Some of them were, as far as the labels would go.
Q. With reference to the entries in the books of the Carlisle Packing Company, regarding this particular transaction, did you do anything toward watching that matter progress?
A. Yes, I put the labels on under Mr. Deming's direction——
Q. The entries in the books, I say—with reference to the book entries of the accounts kept by the Carlisle Packing Company, what particular supervision, if any, did you give to those entries?
A. I had them entered under the different brands all those that were branded.
Q. Where were these books kept with reference to where you were?
A. They were in my office.
Q. Right before you?
A. Yes sir.
Q. And are you prepared to state that the entries relating to the sale of this salmon were correct as to your own knowledge??

Mr. McCORD: I object as he already says he knows nothing about those books.

The COURT: I directed you gentlemen the other day to confine yourselves to the exhibits, to the accounts in question here, and I think that is the only thing involved. If he knows anything about those accounts I will permit him to testify. I think he should answer this question if he can.

Mr. McCORD: I object as incompetent, irrelevant and immaterial; the witness has not shown himself to be qualified because the evidence counsel is attempting to elicit from the witness is
196 based on the record entries in the books, and that cannot be testified to until it is shown these books are a complete record of the transactions made during this time by the Carlisle Packing Company with its customers generally.

The COURT: Objection overruled.

(Last question read.)

A. Yes sir.
Q. You say they were?
A. Yes sir, they were.
Q. Referring to defendants' exhibits D, E, and F, being 3 certain warehouse receipts, numbered 8, 19 and 24, I will ask you whether those are the warehouse receipts, and all of them that covered this particular lot of salmon?
A. I do not know whether they are all of them or not.
Q. As far as they go do they cover this particular salmon that is in controversy here?
A. Yes, those were the flat pinks.
Q. Referring to the interview which you had with Mr. Deming in the First National Bank on February 5th, 1908, I will ask you whether Mr. Deming came there by appointment or did he just happen to come in, if you know?

Mr. McCORD: I object to the question as immaterial, if he was there that was enough.
The COURT: Yes, I think so.
Mr. DOBE: It is a preliminary question.
The COURT: Very well, I will permit him to answer. You can move to strike it if it is not preliminary.

A. He came there by appointment with Mr. Purdy.

Mr. McCORD: I move to strike that as hearsay.

The COURT: If he knows he may say.

A. I know.
Q. How do you know?
197 A. I heard Mr. Purdy make the appointment over the telephone.
Q. When he came over did he have any figures with him upon which that payment was made?
A. Yes, he had those.
Q. He brought them with him?
A. Yes sir.
Q. That $52,000.00 or a little less than $52,000.00?
A. Yes.
Q. I want to ask you about the pack of pink salmon generally in 1907, was it an average pack or a large or small one?
A. It was a very large run of pink salmon.
Q. Did it exceed expectations?

Mr. McCORD: I object as being immaterial.
The COURT: I think he should be permitted to answer the question.

Q. Tell the jury about that pack; first, how it compared with other years?
A. Everybody that I talked with in the business and including myself thought there would be no pink salmon.

Mr. McCORD: I move to strike about what he thought.
The COURT: The answer may be stricken.

A. We did not expect to get to exceed a third of the pack of pink salmon we did get.

Q. You mean to say it was three times as large as you anticipated?

A. Yes, sir, three times as large.

Q. Did Mr. Deming's company pack any flat pinks that year that you know of?

Mr. McCORD: I object as immaterial.

Mr. DORR: I think it is material in view of the fact that they were to be pro-rated with his pack when sold.

The COURT: He may answer.

A. Yes, sir.

198 Q. How many, if you know?

A. I do not know.

Q. Do you know approximately?

A. I understand 40,000 cases, I do not know.

Mr. McCORD: I move to strike out the answer if he does not know and he says he does not know.

The COURT: It may be stricken.

Q. Do you know approximately whether he had—anything about the quantity he had?

A. He had a large pack of pink salmon, but I do not know how many.

Q. Do you know whether he had as much as you did?

A. He had more than I did.

Q. Do you know whether he sold any of that kind of salmon during that fall of your own knowledge?

A. He told me he sold them at 75 cents a dozen.

Q. How many did he sell at 75 cents a dozen?

Mr. McCORD: I object as incompetent, irrelevant and immaterial.

The COURT: Let him answer.

A. Six hundred cases. That was just after the opening, I do not know how many he sold afterwards, he told me he sold 600 soon after.

Q. Six thousand or six hundred?

Mr. McCORD: I object to the question as leading. He is cross examining his own witness.

A. Six hundred.

The COURT: He answers the same way.

Recross-examination of Mr. FRANK WRIGHT by Mr. McCORD:

Q. Referring to that telegram, did you read it yourself?

A. Mr. Brosco showed it to me.

Q. What was the contents of it?

A. I am not quite clear, but as I remember it, it was "Hold

199 Carlisle check" it was to hold the check, any way.

Q. And you say that was sent from where?

A. From the train that Mr. Deming was on.

Q. Somewhere in the state of Washington?

A. I am not sure whether he was out of the state of Washington or not, but he was on his way to the city of Chicago.

Q. Do you know what date it was?

A. No, sir.

Q. It was the day after the panic?

A. It was the day before I understood the panic was on.

Q. How long after Mr. Deming had gone East was it that you say you saw this telegram?

A. Not more than two days.

Q. You are sure of that, are you?

A. Yes, sir.

Q. As a matter of fact wasn't that telegram sent you from Chicago or St. Louis?

A. It was not sent to me at all.

Q. I mean that it was sent from St. Louis?

A. He could not have had time. The check, as I understood it, was written in the morning and I was to get it the next morning.

Q. Did not Mr. Deming tell you he had a lot of checks not filled in but signed, and did you not know that was his customary way of doing when he left for any length of time, to leave them with Mr. Brosco—the check of the Carlisle Packing Company was never made up as far as you know?

A. Yes, sir.

Q. You did not see it?

A. No, sir. He told me it was.

Q. You are positive that that telegram was sent from somewhere between here and Eastern Washington, the one regarding this check?

200 A. No sir, not Eastern Washington, but between here and St. Louis.

Q. You are sure it was not sent from St. Louis?

A. Yes sir.

Q. Are you prepared to swear to that?

A. Yes sir, I know he did not have time to get to St. Louis.

Second redirect examination of Mr. FRANK WRIGHT by Mr. DORR:

Q. There was one thing I omitted in re-direct examination I wish to ask him now.

The COURT: Proceed.

Q. Counsel for the defendants has asked you with reference to a telegram or telegrams sent by you to Mr. Deming, I will ask if you received any letters from him in reply?

A. Yes sir.

(Plaintiff's exhibit 28 marked for identification.)

Q. This was with reference to the payments, I mean, asking about money due your company, is that correct?

A. Yes sir.

Q. Look at Plaintiff's identified exhibit 28 and state if you know whose signature is on that letter?
A. Mr. E. B. Deming's.
Q. And where did you get it?
A. At Bellingham.
Q. How did you get it?
A. Through the mail.

Mr. DORR: I ask that that be introduced in evidence.
Mr. MCCORD: No objection.
The COURT: It may be admitted.
Mr. DORR: I will read this exhibit into the record (reads): "Mr. Frank Wright, Bellingham, Washington. Dear Frank: Your telegram of the 9th received and I replied to it this morning as follows:
"Will do the best I can and as soon as I can, but cannot
201 do much until banks take the lid off." Now there is no use in your talking about promises when the banks around the country refuse to do as they promised and until the banks stop and cool down there is mighty little we can do or any merchant in the country can do. The trouble is that every bank is trying to force every one of its clients. Every merchant today is trying to help the banks and the general situation but in turn the banks must help them to the extent of at least holding them up. This Mr. Purdy will have to do for you under present conditions. We cannot be bankers for everybody. The First National Bank of Bellingham have all of your collateral and it is good collateral; just as good as if they had that money deposited with some bank here in Chicago, who would refuse to give them the money. All I can say is to repeat what I have wired you, that we will do the best we can as soon as we can" Signed E. B. Deming.

Second recross-examination of Mr. FRANK WRIGHT by Mr. MCCORD:

J. That letter "to do the best I can" that referred to the $32,000.00 check, did it, for the sale of the sockeyes?
A. Yes sir.
Q. That has no reference to the pink salmon at all, it only refers to the sockeyes?
A. It referred to the salmon that was sold and the amount that was due at that time.
Q. That was for the sale of the sockeyes?
A. Yes sir, and I think some pinks, were in it too.
Q. Was it $32,000.00 or $22,000.00 or $19,000.00, which was it now?
A. I think it was $32,000.00, I do not remember the exact amount, just now.

(Whereupon the witness was excused and left the stand.)

202 Mr. E. W. PURDY, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination by Mr. DORR:

Q. Please state your name, age and residence?
A. E. W. Purdy, 48, Bellingham.
Q. What business are you engaged in?
A. The banking business.
Q. How long have you been in the banking business here?
A. Thirteen years.
Q. What bank are you connected with?
A. The First National Bank of Bellingham.
Q. And how long have you been connected with that bank?
A. Since it was a corporation.
Q. What is your position or official position in the First National Bank?
A. I am president.
Q. When was the First National Bank organized?
A. In 1907, we took over the business of the firm of Graves & Purdy.
Q. It merely succeeded to the old bank?
A. Yes sir.
Q. And you were a partner in the firm of Graves & Purdy?
A. Yes sir.
Q. Do you know Frank Wright?
A. I do.
Q. How long have you known him?
A. I have known him for 15 years, I should say.
Q. Did he do any banking business with your bank in the year 1907?
A. The company with which he is connected did, the Carlisle Packing Company.
Q. Who transacted the business for the Carlisle Packing Company?

203 A. He did.

Q. Had your bank done any business with the Carlisle Packing Company prior to that year?
A. They had.
Q. And who had acted for the Carlisle Packing Company?
A. Mr. Frank Wright.
Q. What was the nature of the business your bank had with the Carlisle Packing Company in 1907?
A. We had their banking business, the general banking business of the company.
Q. Did you loan them any money?
A. Yes sir.
Q. A large or small amount?
A. Quite a large amount.
Q. Did you loan them any money with reference to the financing of their pack that year?
A. We financed them that year, yes.

Q. Can you tell in a general way the aggregate of the money that they borrowed from your bank?

Mr. McCORD: I do not want to object, but I think it is immaterial.
The COURT: Let him answer.

A. I do not remember the exact amount; the amount we loaned them on the warehouse receipts, you mean?
Q. Yes.
A. It would run up to probably $50,000.
Q. That would be at least a line of $50,000.00?
A. I think it was somewhere along there, that year.
Q. Do you know Mr. E. B. Deming?
A. I do.
Q. How long have you known him?
A. Since he came here.
204 Q. Prior to that where was it?
A. I knew him when he first became connected with the Pacific American Fisheries.
Q. Was it prior to 1907?
A. Yes sir.
Q. Do you know what relation he sustained at that time to the Deming-Gould Company?
A. He was the man who transacted the business at this end of the line for them.
Q. What relation did he sustain to the Pacific American Fisheries?
A. He was their manager.
Q. Did you have any conversation with Mr. E. B. Deming during the early part of 1907 with reference to a sale and purchase of the pack of salmon of 1907 of the Carlisle Packing Company?
A. Yes sir.
Q. About when was that, if you can fix the time, if not get it approximately?
A. As near as I can remember it was somewhere along in the spring or early summer.
Q. You cannot tell the exact time?
A. No sir.
Q. Where was this conversation?
A. In the bank.
Q. Your bank?
A. Yes sir.
Q. Who was present with you, if anybody, except Mr. Deming?
A. I am referring now to no particular conversation; we may have had others. I was in the office one day when Mr. Deming came in and we talked the matter over.
Q. What did he tell you?
A. As I remember the remark that he made was that he
205 had fixed it up with Frank Wright that day and then he went on to tell me he had bought the pack of salmon.
Q. How came him to talk to you about it, if you know?

Mr. McCORD: I object as immaterial.

Q. Did Mr. Deming know you were financing the Carlisle Packing Company?

A. I think he did.

Q. In speaking of Frank Wright, do you know whether he alluded to the Carlisle Packing Company?

A. That was the only connection we had in any way——

Q. As far your conversation was concerned Frank Wright and the Carlisle Packing Company were the same thing?

A. Yes sir.

Q. Did Mr. Deming say anything further to you?

A. He told me, if I remember right, that the fish were all to be taken at a certain date whatever was not sold at that time he was to pay for, if I remember the date it was January or February, 1908.

Q. Now subsequent to that time about early in February, 1908, was there any conversation between yourself and Mr. Deming and Mr. Wright in your bank?

A. There was a little argument there one day between Mr. Wright and Mr. Deming.

Q. What day was that, if you know?

A. It was about that time.

Q. About the 5th of February?

A. I should judge about there, of course, I cannot remember those dates.

Q. It is not material to remember the exact date, but I want to know the approximate date—what was the occasion of this argument?

A. It was a dispute over the contract. They got in a very heated argument and were talking very loud. I left and went out
206 and shut the door, but you could have heard a good deal of it if you had been in the next block.

Q. Rather loud, was it?

A. Yes sir.

Q. Do you know what they said?

A. I could easier tell you what they did not say.

Q. Can you recall anything that——

A. Mr. Wright was accusing Mr. Deming of breaking faith and breaking his contract, and Mr. Deming was denying it; that was about the sum and substance of it.

Q. What did Mr. Deming say?

A. He denied it.

Q. He denied breaking faith, or denied what?

A. He denied the contract, as near as I can remember from the talk.

Q. That is, denied that he had any contract?

A. He denied the terms of it, as near as I could gather.

Q. What was Mr. Wright claiming?

A. He was insisting on the contract being carried out as he said it was made in very strong terms.

Q. You did not know the price of the fish?

A. No.

Q. I will ask you whether or not your bank during 1907 and the

next year had any warehouse receipts on the fish packed by the Carlisle Packing Company?

A. We did.

Q. How did you hold those, Mr. Purdy?

A. We held them as collateral to their loans.

Q. What arrangement, if any was there by which Mr. Deming could withdraw the fish and make payments?

A. Whenever an order came in for fish Mr. Wright would
207 phone us the order and we would phone over to the warehouse and give them instructions how to ship and they would ship it and endorse them on the warehouse receipt.

Q. Who made the payments?

A. We collected them for the company from the people they were shipped to.

Q. You are speaking with reference to the pink flats that were sold later on?

A. The last salmon that they said were pinks, yes sir.

Q. You collected for them with drafts?

A. Yes sir, we made the drafts. Mr. Wright would instruct us as to the amount to draw for and the number of cases to be shipped and we would phone over to the warehouse and they would ship the salmon, and they would send a bill of lading and we would attach it to the draft and send them out.

Q. So the money all came to your bank?

A. Yes sir.

Q. And you kept a correct account of how much you collected?

A. We did.

Q. Have you any method of stating now, how much you collected?

(Witness examines papers.)

A. Yes sir.

Q. What is it?

A. We checked up from our collection ledger, the different shipments.

Q. How much did your bank collect in that way for these fish?

A. Between the 22nd of July, 1908 which was the first of these shipments that were made——

Q. When was the last one made?

A. The 27th day of September, 1909.

Q. That was the dates the amounts were paid?

208 A. Between those dates.

Q. What is the aggregate?

A. $29,066.40.

Q. I will go back now to that 5th day of February occasion; was there any money paid to your bank at that time by Mr. Deming?

A. Something like $50,000.00, as I remember it.

Q. Who paid it?

A. I think it was paid by Mr. Deming.

Q. What was that for?

A. That was for, as I remember it, the other brands of fish aside from these pink flats.

Q. Look at the deposit slip I now hand you and state whether or not you know what that is?

A. Yes sir. (Plaintiff's exhibit 29 marked for identification.)

Q. What is this paper? (Hands witness exhibit 29.)

A. A duplicate deposit slip.

Q. Made out by your bank?

A. Yes sir.

Q. What does it purport to show?

A. It shows that on the 5th day of February, 1908, there was deposited in the bank to the credit of the Carlisle Packing Company $51,731.33, less amount deducted by the P. A. F. Company of $1,299.43 making a balance of $50,431.80.

Mr. McCORD: Deposited by whom?

A. Deming-Gould Company.

Q. Who did the business for them?

A. Mr. Deming.

Q. Who made out that slip?

A. I did.

Q. You know from your own personal knowledge that is the correct amount?

209 A. Yes sir.

Q. How did you know what that money was for, how did you get that information, from whom did you get the information what that amount was paid for by Deming-Gould Company, what fish was covered by that payment?

A. I do not quite understand you?

Q. I understood you to say that this was for the other fish, other than those in controversy in this action, who told you that, how did you find it out?

A. Mr. Deming told me he was paying for the balance of his cohoes and I think for the balance of his sockeyes, in fact I loaned him a part of the money to pay for it.

Q. Was that some of the fish—some of the remainder of the Carlisle Packing Company's pack?

A. Yes sir.

Cross-examination of Mr. E. W. PURDY by Mr. McCORD:

Q. You say that sometime in the spring or summer of 1907 you had your first conversation with Mr. Deming in which he stated he had fixed the matter up with Frank Wright for the salmon pack of 1907?

A. Yes sir, 1907 as I remember it.

Q. And he didn't undertake to tell you the terms of the contract that is as to what he was to pay?

A. No sir.

Q. He never did tell you?

A. No sir.

Q. During your entire business transactions for the Deming-Gould Company and Mr. E. B. Deming, Mr. Deming never at any time told you anything about what he was paying for them or

at what price the remainder of the pack of 1907 was to be taken over at?

A. I do not remember anything about the price.

210 Q. Referring to the conversation of February 5th, 1908, you say you do not remember very much about what was said except the substance was that Mr. Wright said a certain contract was made and Mr. Deming denied it?

A. The difference of opinion in that conversation seemed to be that Mr. Wright was claiming the fish was bought on the opening price and Mr. Deming claiming it was bought on the market price. That seemed to be the sticking point between them.

Q. That was the market price on February 1st?

A. Yes sir.

Q. You say the $52,000.00 draft was a Deming-Gould draft, deposited by Deming-Gould Company?

A. Yes sir, it was paid by the Deming-Gould Company.

Q. That was made up for the sale of the tall pink salmon, was it, too; or was it sockeyes?

A. I could not say now. As I remember it that practically cleaned everything up except the flats.

Q. Was anything said in regard to the tall pinks that you recall?

A. I do not recall anything, no.

Q. You do not know—you do not recall anything in that conversation with Mr. Deming right after that conversation with Mr. Wright in regard to the tall pinks?

A. Right after the heated argument they had in my place?

Q. Yes sir, over the phone or anything?

A. No, sir.

(Whereupon the witness was excused and left the stand.)

211 Mr. Edward H. Hamlin, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination by Mr. Dorr.

Q. What is your name?

A. Edward H. Hamlin.

Q. What is your age?

A. Thirty-eight.

Q. What is your residence?

A. Seattle.

Q. What is your business?

A. Salmon brokerage business.

Q. With what firm?

A. Kelley-Clarke Company.

Q. How long have you been acquainted with that firm?

A. Twenty years.

Q. What is the nature of their business with respect to salmon?

A. We are agent for various packers, selling agency for various salmon packers.

Q. Is it a large concern or a small one?
A. It is reputed to be fairly large.
Q. What particular business do you attend to, what position do you occupy in the business?
A. I am the manager of the sales department.
Q. For salmon?
A. Yes sir.
Q. How long have you occupied that position?
A. Since 1905.
Q. What part—is it a part of your business to keep track of the salmon markets?
A. Yes sir.

Q. Where are the salmon markets, where is the salmon
212 sold?

A. All over the world, to a great extent.
Q. Is it sold in the United States?
A. Yes sir.
Q. To what extent?
A. Why I should say that 3/5 of the Coast pack is sold in the United States.
Q. And the balance goes to foreign countries?
A. Yes sir.
Q. Is it a part of your business to know the opening prices?
A. Yes sir.
Q. I will ask you what is meant in the trade by the term "opening prices" of salmon?
A. That is a price that is made from year to year on the salmon pack for that year.
Q. Who makes the prices from year to year?
A. There are various factors that control the prices to some extent.
Q. Coming down to Puget Sound; who makes the prices from year to year?
A. The Deming-Gould Company.
Q. How long has that been their custom?
A. Ever since I have had anything to do with the salmon department.
Q. As long back as 1905?
A. Yes sir.
Q. Was that true in 1907?
A. As far as I can remember it was.
Q. What relative proportion of the Puget Sound salmon pack does Deming-Gould Company handle?

Mr. McCORD: For 1907?
Mr. DORR: I am speaking generally, now.

Mr. McCORD: I object to his answering generally.
213 The COURT: Let him answer.

A. I should say from 60 to 65%.
Q. Of the whole?
A. Yes sir.

Q. Then they are by far the largest brokers in Puget Sound salmon?

A. Yes sir.

Q. How many brokers are there in the business that handle Puget Sound salmon?

A. There are quite a number, 5 large people and other smaller ones; quite a few small ones.

Q. Of that entire quantity Deming-Gould handle 65%?

A. Their companies pack practically 60 to 65%.

Q. Do you know when the opening price was made on Puget Sound salmon in 1907?

A. Late in August, 1907.

Q. Do you know what the opening prices were that were announced to the trade?

A. Yes sir, I do.

Q. What was the opening price on one pound flat pink salmon?

A. Ninety cents.

Q. Ninety cents for what—how many cans?

A. Four dozen cans to the case, 90 cents a dozen, $3.60 a case. There was one thing you asked about, the percentage of the pack that Deming-Gould Company packed. I was off on that percentage.

Q. I mean the percentage they sell, not what they pack, is that the way you understood it?

A. No, I thought you meant the amount they pack. I was going to correct my statement as to what they packed.

Q. I did not mean to ask what they packed?

A. I said 60 to 65%, that would be too large a percentage as to what they pack themselves.

214 Q. Is that true as to the amount they sell?

A. It would be true as to last year and several years back, approximately.

Q. At any rate their business is the largest on the Sound?

A. Yes sir, on the Sound.

Q. Do you know a publication called the Pacific Fisherman?

A. Yes sir.

Q. What is that paper?

A. That is a paper devoted to the fishing industry of the north Pacific Coast.

Q. Where is it published?

A. At Seattle.

Q. Do you know whether the opening prices of 1907 were published or not to the world?

A. Yes sir, I know they were.

Q. I will ask you to look at the paper which I now hand you and state what that is, if you know? (Hands paper to witness.)

A. It is the Pacific Fisherman.

Q. Is that a regular publication?

A. It has been there for some years.

Q. Was it published prior to 1907?

A. Yes sir.

Q. And it has been published ever since?

A. Yes sir.

Q. And was it published during that year?

A. Yes sir.

Q. What relation does it sustain to the salmon trade?

A. It is just like any other market paper devoted to different industries. It publishes the market news and gossip and that sort of stuff.

Q. Is it what the name purports to be, a fishing paper,
215 a paper devoted particularly to the fishing business?

A. Yes sir.

Q. Have you a copy of that paper containing a statement of the opening prices for 1907 on Puget Sound salmon?

A. Yes sir.

Q. You have it before you?

A. Yes sir.

Q. Do you know of your own personal knowledge that is a correct statement of the opening prices that were put out that year?

Mr. McCord: I object to the question on the ground the witness says that he is testifying from his own knowledge, and he now asks him to verify some publication. I object to the reference to the publication on the ground it is irrelevant, incompetent and immaterial, hearsay and it is not any evidence that tends to fix the opening prices or tell what they were.

Q. Is the opening price as stated there any different from that you stated?

Mr. McCord: I object to the question as incompetent, irrelevant and immaterial, not the best evidence and simply hearsay. That is wholly immaterial, secondary evidence, no evidence at all that is competent to fix the opening prices.

Mr. Dorr: I wish to now show it was published to the world and I have identified this trade journal devoted to this business the only one published on this Coast that year, I think, and I think I have a right to show the general dissemination throughout the trade of these prices through its publication.

The Court: I do not see what it has to do with this case.

Mr. Dorr: I want to show that this opening price went out to the public.

The Court: With a view of reaching Mr. Deming?

Mr. Dorr: Yes sir. It has been testified here that his
216 company made it, and I want to show this went out to the world.

The Court: If this witness knows he can testify about those things.

Mr. Dorr: I want to put this trade paper in evidence.

Mr. McCord: I object to its introduction for the purpose of binding these defendants, on the grounds just stated.

The Court: I do not see where it is material in this case, Mr. Dorr.

Mr. Dorr: It is material to give publicity to the price. It is a publication going out to the world.

The COURT: I will reserve the ruling for the present and I will look into that proposition. (Court examines paper.) You are offering this at this time?

Mr. DOBE: Yes, your Honor, we are offering it.

Q. Do you know, Mr. Hamlin, whether the copy of the paper which his Honor has now examining it, the one you have been testifying about, is one of the regular files of that paper?

A. As far as I know it looks like it.

Q. Where did you get it?

A. We subscribe to it, it comes to our office.

Q. Comes to your office?

A. Yes sir.

Q. Passing that for the time being, but without waiving our offer, I will ask you if you know whether there was any flat pink salmon sold at the opening prices that fall?

A. We sold flat pink salmon at the opening prices.

Q. Do you know anything about the panic that came along that fall?

A. Yes sir.

Q. Have you any distinct recollection of it?

A. Yes sir, I remember it very distinctly.

Q. What influence, if any, did it have on the sale of fish?

217 Mr. MCCORD: I object as irrelevant, incompetent and immaterial. It is purely speculative and too remote.

The COURT: I think that is a matter for the jury. You can show the conditions; if there was a panic, and it is my recollection there was, and the jury will determine the matter, not him.

Q. Proceeding now until the next February, say the first of February, the 5th of February, 1908, do you know what the market was on pink flat salmon at that time? I am not referring to the opening price, but what was the demand, what kind of a market was there.

A. There wasn't any market.

Mr. MCCORD: I move to strike the answer as not responsive.

The COURT: It may be stricken; let the question be read.

(Question read.)

Q. Do you know whether there was any market at that time, or not, for this fish, and what the demand was?

A. There wasn't any market.

Mr. MCCORD: I move to strike the answer as not responsive.

The COURT: The answer is stricken.

Q. I ask if you know; answer yes or no? (Question read at line 6 of this page.)

Q. Do you know that?

A. Yes sir.

Q. State what it was?

Mr. MCCORD: I object as incompetent, irrelevant and immaterial. The witness is not shown to be qualified.

The COURT: Let him answer.

Q. State the conditions at that time?
A. Naturally, from the panic——

Mr. McCORD: I object to his making any argument.

A. There wasn't any market in the spring of 1908 for any kind of salmon.

218 Q. How long did the depression continue after February 5, 1908, in the salmon trade?

Mr. McCORD: I object as incompetent, irrelevant and immaterial. The witness is not shown to have any knowledge of the matter.

The COURT: He may answer.

A. On certain grades of salmon there was no market at all throughout the year 1908.

Q. What was the condition with respect to pink flat salmon?

A. There wasn't any particular market for flat pink salmon for the year 1908.

Q. Can you give any particular reason why the pink flat salmon were more unsaleable than other flats?

Mr. McCORD: I object as immaterial, and as assuming a state of facts not shown.

The COURT: I believe it is objectionable.

Q. Do you know anything about the size of the pack of pink salmon for the year 1907 relatively; was it large or small that year?

A. The 1907 pack was very large.

Q. Did you sell any pink flat salmon yourself in 1908?

A. Yes.

Q. Did you sell any pink flat salmon in February, 1908?

A. We sold a few cases throughout the year from month to month.

Q. What was the first date in February, 1908, that you made any sales if you know?

A. I do not remember the exact date.

Q. Do you know the price that was obtainable in February, 1908?

A. The sales we made in February were for 70 cents.

Mr. McCORD: I move to strike the answer as not responsive. The question would be what the market price was. He says there was no market price at that time, and now he goes on and introduces evidence showing what he sold them for.

219 The COURT: I do not think that would be material.

Mr. DORR: I am trying to show we sold this salmon at a fair price.

The COURT: I do not think that is the inquiry.

Mr. McCORD: I move to strike the answer.

The COURT: I will let the answer be stricken. I do not think that is the test.

Q. Have you any idea as to what 11,000 cases or thereabouts of pink flats could have been sold at at that time?

Mr. McCord: I object to his idea.

Q. Do you know what the market value of 10,914 cases or thereabouts of pink flat salmon, put up in one pound flat cans, what it could be sold for in the open market in the ordinary way between February 1st and July 2nd, 1908?

Mr. McCord: I object to that on the ground the witness has shown no competency to give any answer at all, and on the ground it is incompetent, irrelevant and immaterial.

The Court: I think he should answer the question. I understand he has been a salesman since 1905 in this particualr class of business, according to his testimony.

(Question read.)

A. I do not believe you could have sold that quantity of pink flat salmon at any price, not in one block.

Q. What was the prevailing market price on this class of salmon from July 2 until August, 1909, July 2, 1908, until August, 1909, if you know, in such lots as could have been sold?

A. From 70 cents down to 60 cents.

Q. In speaking of the price at 70 cents and 60 cents, et cetera, I will ask you whether you mean by that, the up-set price, less any commissions—I mean less any discounts or whether that is subject to discounts?

A. All the prices I mention are subject to discounts.

Q. What is that discount?

220 A. One and a half and five per cent.

Q. Do you know the Carlisle Packing Company?

A. Yes sir.

Q. Do you know Mr. Frank Wright?

A. Yes sir.

Q. Have you ever done any business with that company?

A. Yes sir.

Q. Previous to 1907?

A. Yes sir.

Q. I will ask you to state to the jury whether your company financed them or not?

Mr. McCord: I object to that as immaterial; the years prior to 1907.

The Court: I do not see that it has anything to do with the case.

Q. Have you ever financed them since that time?

Mr. McCord: I object as being immaterial.

The Court: I will sustain the objection.

Q. I will ask you this question: from your experience in the salmon business, selling of salmon, and your knowledge of conditions as they existed between the 2nd day of July, 1908, and August, 1909, with those facts within your knowledge, I want to ask you what you would say a reasonable return would be from, say 10,903 cases of flat pink salmon, put on the market by a concern situated

as the Carlisle Packing Company was at that time, what would you say would be a reasonable amount to be expected that that salmon would sell for?

Mr. McCORD: I object to the question as irrelevant, incompetent and immaterial. The witness is not shown to be qualified and it is not a proper hypothetical question.

(Question read.)

The COURT: I do not know about that. When you say "situated as the Carlisle Packing Company was" do you mean with reference to place?

221 Mr. DORR: With reference to the size of their business and their facilities for selling and the fact that they had this stock carried over from the previous year, all the circumstances this witness knows about.

The COURT: I am inclined to sustain the objection because of that element. I think the question ought to go to the quantity and the time and place where it has to be marketed from.

Q. Assuming that a salmon packer on Puget Sound had on hand on the 2nd day of July, 1908, 10,903 cases of pink salmon, packed in one pound flat cans, and desirous of selling the salmon to the best advantage, what would you say would be a fair price to be expected to be realized from such sale between that date and say the first of September, 1909?

Mr. McCORD: The same objection—irrelevant, incompetent and immaterial. The witness has not shown himself to be qualified, and it is not a proper hypothetical question.

The COURT: He may answer.

A. I could not answer that question, it is too hard, I cannot answer that question.

Q. Why is it too hard. What is there about it you do not understand?

A. The quantity in the first place was so large nobody in the market would have taken that amount, there was nobody in the market for that amount of salmon at that time.

Q. I do not mean it was to be sold at one time, but was to be distributed over that period of time in small lots.

A. The market at that time was all the way from 70 cents to 60 cents, any quantity that you could sell.

Q. Assuming this quantity of salmon which is mentioned of that grade and style of package was sold in the open market between those dates at a price yielding between 60 and 70 cents a dozen, what would you say as to that being a fair market price?

222 Mr. McCORD: I object to the question as irrelevant, incompetent and immaterial, not a proper hypothetical question, argumentative, leading and cross examination of his own witness.

The COURT: I will let him answer the question.

A. I would consider that a very good price.

Cross-examination of Mr. EDWARD H. HAMLIN by Mr. MCCORD:

Q. You state that Deming-Gould Company controlled in the year 1907 about 60 to 65 per cent of the pack of salmon, how do you know that?

A. That is my recollection of it.

Q. I want to know what was the pack in 1907 of all grades and classes of salmon?

A. Something like 800,000 cases, I think.

Q. How much of it did the Pacific American Fisheries pack, do you know?

A. I think their pack was between 250 and 300,000 cases.

Q. How much was the Alaska Packers' Association's pack?

A. I do not remember.

Q. How much was the Fidalgo Island Packing Company's pack?

A. I do not remember.

Q. How much was the Apex, White Crest, Ainsworth & Dunn?

A. I do not remember the exact figures, I just know the total.

Q. Do you know what cannerymen's packs Deming-Gould Company handled on the Sound in 1907?

A. I believe I do.

Q. What were they?

A. Their own canneries.

Q. What do you mean by their own canneries?

A. The Pacific American Fisheries at Bellingham and at Anacortes.

Q. Did they have any at Anacortes in 1907?

A. I do not believe they packed there in 1907.

223 Q. What other packs did they handle?

A. Mr. Welsh's pack in South Bellingham.

Q. Do you know whether they handled that pack that year?

A. Yes sir.

Q. How much did he pack?

A. I do not remember exactly.

Q. What other packs did they handle?

A. I do not recall right off the reel.

Q. The total pack was about 800,000?

A. That was my recollection of it.

Q. Do you know what the Pacific American Pack was that year?

A. My recollection is of the figures as published it was between 250 and 300,000.

Q. Was it 200,000, was that not what it was?

A. No, I think it was nearer 250,000 than any other figure.

Q. Do you know what Mr. Welsh's pack was?

A. I should judge from the size of his cannery about 40 to 50,000.

Q. And you do not know any other pack that was handled by them?

A. No sir.

Q. Then why did you say they handled from 60 to 65% of the entire pack?

A. When I stated from 60 to 65% of the whole that meant from year to year, but each year their own pack that they control absolutely is about 40%.

Q. In 1907 you do not know of more than 200,000 cases that they handled?

A. The amount that a broker handles from year to year varies.

Q. In 1907 that was about 33 1/3, was it not?

A. It would figure about that much.

Q. Did Deming-Gould ever handle more than 33 1/3 per cent or 40 per cent of all the pack, prior to the year 1909 to your
224 knowledge?

A. No sir, I could not swear about that.

Q. The- possibly you are mistaken when you say they handle from 60 to 65% of the pack?

A. No sir, I think taking year after year, it would be about that.

Q. What do you base it on?

A. On the statistics that are furnished.

Q. Do you know of any other pack that they handle than Mr. Welsh's and the Pacific American Fisheries, if you do I wish you would state it. I assume you want to be fair about this matter. Do you know of any others that they handled in 1907?

A. I think they handled some of the Apex in 1907. I think I called up Mr. Willard and asked for their pack and he said Mr. Deming was handling the pack.

Mr. McCORD: I move to strike the answer as hearsay.

Q. As a matter of fact Deming-Gould Company did not handle that pack, the pack of the Apex in 1907, I will state that for your own knowledge. Do you know of any other?

A. They handled the Carlisle Packing Company's pack.

Q. How much was that?

A. About 50,000 cases, I think. I have not memorized the figures from year to year.

Q. You say Deming-Gould fix the price of salmon?

A. They usually do.

Q. How do they fix it?

A. They just announce it.

Q. They announce what they are going to sell salmon for?

A. Yes sir.

Q. You know, as a matter of fact, that dealers in salmon pay very little attention to it. They sell any way they want to regardless of the opening price?

A. No sir, they follow the opening price very closely.

225 Q. Did your concern follow it in 1905?

A. No sir, not in 1905.

Q. You sold salmon for $1.00 when the opening price was $1.05?

A. It might be under some circumstances, but we usually held to the opening prices.

Q. Did you not sell at $1.25 when the price fixed by Deming-Gould Company was $1.35 in 1908?

A. We sold some to other packers at $1.25.

Q. You made the statement that during the year 1908 you could not sell 10,903 cases of flat pink salmon; you meant you could not sell it to the jobbers or merchants, but there is always a market for salmon in large quantities to dealers, is there not?

A. Yes sir.

Q. You did not mean to say that it was absolutely worthless and could not be sold to anybody for any price?

A. No sir.

Q. You know that as far as your firm is concerned if you knew of a big block that could be bought, you would go buy it?

A. No sir, we never buy.

Q. But lots of brokers would have done so?

A. Not many of them. Eastern brokers may, but brokers representing packers very seldom speculate.

Q. They very seldom buy outright?

A. Yes sir.

Q. And they still more seldom buy a pack of salmon in the spring of 1907 at a price to be fixed 4 months later and to be delivered 12 months later at prices fixed 4 months after the sale? Did you ever hear of such a contract made by a broker?

A. I have heard of it.

Q. This is the only instance on earth, is it not?

A. I have heard of others.

226 Q. By whom?

A. That was a contract made by Deming-Gould in 1909, I understand.

Q. Do you know that of your own knowledge?

A. People that made the contract claim that was the deal.

Q. Did you ever see the contract?

A. No sir.

Q. You do not pretend to know anything about it only what you have heard?

A. Yes sir, I do not know it as a fact.

Q. Do you know that was limited to one-half the sockeye pack and that was not purchasing either?

A. No, I understand they were taking the whole thing.

J. Did you not know that whatever salmon was bought that way was limited to the sockeye pack and only one-half was claimed to have been sold then?

A. No sir, I do not. I did not know what the contract was but I was told that, because we solicited these fellows and that was what they told us.

Q. You never heard of any such a contract prior to 1909?

A. No, I did not pay any attention to it.

Q. And that is not a contract you would enter into?

A. We do our business in a different way than other people. We are simply brokers, and we are not in the packing or buying business.

Q. What would you say, Mr. Hamlin, as to an offer made on February 5, 1908 for this 10,903 cases of salmon at 80 cents a dozen?

Mr. DORR: I object to that as not proper cross examination. That offer as testified to was a conditional offer. (Argument.) (Question read.)

The COURT: As to being reasonable or unreasonable as the fair market value?

Mr. MCCORD: Yes sir, what would you say as that with re-
227 gard to that as being the market value.

Mr. DORR: I object to that question unless it embodies the condition that was made with it.

The COURT: I understand this is independent of Mr. Wright's testimony as to the condition. He may answer.

A. I would consider that a very good price for that many pink flats at that time.

Q. Do you think that would be in harmony with the value of the goods?

A. At that time, yes sir.

Q. As a matter of fact how would the saleable or real value of goods on February 5, 1908 compare with the value of the goods a few months later, say 2 months later, did they go down or did they go up, or was it fluctuating?

A. It was from 55 cents and up to 70 cents, depending on the quantity; the quantities were small. I am speaking of our own sales of pink flats; the prices ran from 55 cents to 70 cents.

Q. But do you know whether you were selling under the market or above the market?

A. There wasn't any market as I stated before.

Q. You say in July, 1908 and September 1 1909 the price was from 70 to 60 cents a dozen?

A. Yes sir.

Q. Do you mean by that, that was what you were selling at?

A. Yes sir, and we were informed that others were.

Q. Do you know that this salmon was sold as high as 75 cents a dozen, 600 cases to Warfield Pratt, Howell & Company and 100 cases to Allen & Lewis at 75 cents, and 600 cases to Stewart, Gwynn & Company, and others, large quantities sold for 75 cents a dozen, when you say you were selling between 60 and 70 cents?

A. Not at that particular time.

228 Q. Would you say such sales were not made on July 22 to August 10, 1908, 600 cases at 75 cents a dozen?

A. I do not know anything about those sales; I was testifying to our sales.

Q. If other sales were made at 75 cents, 80 cents and 85 cents, which would you say was the market value, your sales or the sales made in the quantity I have suggested and the prices I have suggested.

A. It is hard to say. There are certain people in certain parts of the country where that size and kind of salmon has been sold, and if you get a buyer that has been handling a certain brand or a certain pack in a certain kind of a can and their customers are used to it they might pay more for that particular article than

somebody else who might have to work the sale up. We were trying to force our flats out for any price we could get.

Q. But if other salmon was being sold at 75 cents and 80 cents a dozen during this same period of time and in larger quantities—you say you sold in small quantities—but in larger quantities at higher prices, which would you say was the market price, your sales or those in which greater quantities were sold.

*Q.* The greatest quantities were sold at the prices I stated.

Q. If you sold in very small quantities, practically none, and other people were selling in larger quantities for higher prices, I ask you to state which you would say was the market price, the price you were peddling for or the price at which the others were selling?

A. I think our price would be the market.

Q. In other words if other people sold at 75 cents and you were selling at 60 cents, you would say yours was the market price?

A. I did not say we sold the entire amount for 60 cents.

Q. If you were selling from 60 to 70 cents and others
229 were selling from 70 to 80 cents, which would you say was the market price?

A. If they sold that quantity I would say that was an indication of the market.

Q. As a matter of fact, during the months of February, March, April and May, 1908, the quoted price for pink flat salmon in the city of Seattle and over the United States generally was 90 cents a dozen, wasn't it, as late as February and two or three months after?

A. Not generally speaking.

Q. It was quoted by the Northwestern Fisheries, a large dealer, and by Deming-Gould Company and by other large brokers, at 90 cents a dozen, was it not?

A. Those quotations did not mean anything.

Q. I say quoted?

A. Yes sir.

Q. And they were published as the prices?

A. Yes sir.

Q. They demanded those prices?

A. They demanded them.

Q. That is a fact?

A. They were published; we published our prices right along.

Q. And those were the prices that were being asked?

A. Yes sir.

Q. That is what you mean by the opening price?

A. Not necessarily, that is what we call spot prices.

Q. The opening price, you say, is put out by Deming-Gould Company before the salmon is sold in order to see if the buyers will take it at that quotation?

A. No, that is the price announced on sales made subject to approval of the price; there is a little distinction in there.

Q. During the year 1907 that was what was known as the hump back year, that is what you mean by pinks?

230 A. Yes sir.
Q. They are hump backs?
A. Yes sir.
Q. And hump backs run bi-annually, every other year?
A. Yes sir, on the Sound.
Q. Because there was no pack of hump backs in 1908, the price began to increase shortly before 1909, did it not, the market began to rise, did it not?
A. No sir.
Q. How many of these flat pinks did you handle during the year 1907; Kelley-Clarke Company?
A. We sold something like 3000 cases, if I remember right.
Q. During the entire year of the pack of 1907?
A. Yes sir.
Q. That is all you sold?
A. Yes sir.
Q. You say you got from 60 to 70 cents a dozen.
A. No sir, of the 1907 pack we got 90 cents for every case we sold.
Q. You sold those early?
A. We sold those subject to the approval of the opening price?
Q. How many did you sell after that?
A. We did not sell any more at 90 cents.
Q. What was your next price?
A. As I say we sold from 60 to 70 cents.
Q. How many did you sell at from 60 to 70 cents?
A. We did not sell very many at 60 cents.
Q. How many?
A. Probably 400 or 500 cases.
Q. How many did you sell at 70 cents?
A. About 10,000 cases.
Q. At 60 to 70?
231 A. Sixty-five to 70.
Q. How many did you sell between 65 and 80?
A. Not very many.
Q. Did you sell any at 80 cents?
A. Very few.
Q. About how many?
A. I cannot say.
Q. One thousand cases?
A. I cannot say.
Q. When did you sell them at 80 cents?
A. At the opening prices for 1908.
Q. About the price of tall pinks, what were they worth in February, 1908?
A. There was no market for pink salmon in 1908.
Q. How did the prices of tall pinks compare with the flat pinks?
A. About 10 cents a dozen less.
Q. Do you know of any tall pinks that were sold during 1908, the pack of 1907?
A. Yes sir.

Q. What did they bring?

A. They sold better than the flats, 80 cents, 75 cents, 67½ cents and 65 cents, as the season was getting along the price became lower, throughout the season.

Q. I mean from February, 1908, until, say July, 1909, with reference to tall pinks?

A. Yes, they were affected. What was on hand went down to 70 and 60 cents.

Q. Had the price gone down in February, 1908, for tall pinks?

A. We held the price up on paper, but we were ready to do business with anybody that had the money.

Q. Do you know of any sales of tall pinks during February, 1908?

232 A. I do not recall any.

Q. Do you know of any actual sales being made at 80 cents a dozen?

A. No sir.

Q. Did you sell any at 80 cents about that time?

A. I do not recall any particular deals.

Redirect examination of Mr. EDWARD H. HAMLIN by Mr. DORR:

Q. Would the fact that a packer had other grades of salmon to sell with the flat pinks be any advantage to him in making the sale of the flat pinks?

Mr. McCORD: I object as incompetent, irrevelant and immaterial.

The COURT: He may answer.

(Question read.)

A. Yes sir.

Recross-examination of Mr. EDWARD H. HAMLIN by Mr. McCORD:

Q. Were you selling any other salmon in the early part of the year 1908?

A. Whenever we sold pink flats we sold others with them.

Q. Was there any trade for Alaska Salmon?

A. Alaska Reds, a few.

Q. Could you sell Alaska reds along with these?

A. Certainly.

Questions by the COURT:

Q. I want to ask you what in your judgment would be the reasonable time required to market 10,903 cases of pink salmon, such as has been discussed here, from the point where they were located, in the open market, beginning February 1, 1[illegible].

Mr. McCORD: I object as irrevelant, incompetent and immaterial, and suggestive and leading.

The COURT: It is a question that occurred to the Court, and has several times in this case, and it is a question the court will certainly

instruct on in this case, on the theory that this plaintiff must be diligent in attempting to dispose of this salmon to avoid loss.

233 Mr. McCORD: I object to the Court's asking that sort of a question.

The COURT: I do not know why it is not within the rights of the Court to bring out anything that is material here.

Mr. McCORD: I withdraw the objection. I was only joking with the Court; I think the question is proper.

A. The question is very hard to answer, your Honor, because there were so many conditions that surrounded the marketing of this particular kind of salmon at that particular time.

Mr. McCORD: I do want to make one objection to that question. I object on the ground the witness has not shown he had any knowledge upon which to form an opinion, and his opinion would be purely and utterly worthless, especially in view of his qualifications. I think this witness has demonstrated his utter incapacity to answer—not because the Court asks it.

The COURT: I think this is a proper question to go to him, he having offered himself as an expert, and I think it is a proper question, and I think it is a material inquiry at this time, and the objection is overruled.

A. Pink flat salmon in any large quantity is an unusual package, and there is not a great deal of it used. There are only certain markets for that size can.

Mr. McCORD: I object to this dissertation; it is not responsive to the question. He said it was difficult to answer.

The COURT: You may go on with the answer, if you have anything further to say.

A. The article itself is something that we have to find a market for because it is not packed every season on Puget Sound. We have only a pack every few years and the pack of 1907 was the first pack I think for about 6 years and we had to get out and make a market, re-open a market with people that had handled it before, and then the prices were very high that year on pink salmon after 4

234 or 5 years' depression, and on the top of the prices came the panic of 1907.

Mr. McCORD: I object to that kind of an argument here in the presence of the jury. The witness is giving his individual opinions instead of answering the question; he goes on in a long dissertation.

The COURT: I presume it is preliminary to telling the time required. Go ahead.

A. The whole sum and substance of it is the pack of 1907, the humpbacks were sold at any old price by some people, and it took 1907, 1908 and 1909 to clean them out, and I believe there is some on hand still.

Mr. McCORD: I move to strike the answer on the ground it is incompetent, irrevelant and immaterial, and not responsive to the Court's question.

Mr. DORR: We resist the motion.
The COURT: I will let it stand.

Second recross-examination of Mr. EDWARD H. HAMLIN by Mr. McCORD:

Q. You say you are sales manager for Kelley-Clarke Company?
A. Yes sir.
Q. Do you fix the prices or do you do the business under the direction of Mr. Clarke? He supervises the prices at which you sell salmon, except in small quantities perhaps?
A. No, Mr. Clarke has not taken much interest in the salmon business until 1908, last year.
Q. Did he fix the prices of your goods?
A. No sir. He did not.
Q. Do you fix them or does Mr. Clarke fix them?
A. I fix them in connection with Mr. Clarke.
Q. You did not have any power or authority to fix the prices independent of him?
235 A. He has no such authority either.
Q. Who is the president of Kelley-Clarke Company?
A. Mr. Clarke.
Q. Are you an officer?
A. I am a trustee.
Q. You are a very small stockholder?
A. Yes sir.
Q. Mr. Clarke directs the policy of your company and fixes the prices?
A. No, not necessarily.

(Whereupon the witness was excused and left the stand.)

Mr. D. CAMPBELL, being called as a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct examination by Mr. DORR:

Q. What is your name?
A. D. Campbell.
Q. Where do you live?
A. South Bellingham.
Q. What business are you engaged in?
A. The packing of salmon.
Q. As a packer?
A. Yes sir, as a packer.
Q. How long have you been engaged in that business on Puget Sound?
A. Since 1899, 10 or 11 years.
Q. Did you pack salmon on Puget Sound in 1907?
A. I did. I packed at Blaine in 1907.
Q. But you were engaged in the business that year?
A. Yes sir.

236 Q. Did you put up any pink salmon that year?
A. Yes sir.
Q. Do you know, and can you tell what kind of a run, as to its being large or small, the run of pink salmon that occurred that year in these waters?
A. It was a large run that year, the run of pink salmon.
Q. How large was it relatively, compared with other years?
A. It was unusually large compared with previous years on which that salmon, that grade of salmon, ran.
Q. Did you pack any pink salmon, or humpbacks, in one pound flat cans that year?
A. Yes sir.
Q. About how many cases?
A. In the neighborhood of 6,000 cases.
Q. Do you know what the opening price on that kind of salmon was for that year?
A. Yes sir.
Q. What was it, for one pound flat pinks?
A. Ninety cents a dozen.
Q. Did you sell any of your pack at the opening price?
A. Yes sir.

Cross-examination of Mr. D. CAMPBELL by Mr. MCCORD:

Q. Who were your brokers that year?
A. Various brokers around the country.
Q. When was the opening price fixed?
A. It would be the last of August, if I remember right.
Q. How many of your pack did you sell at the opening price, 90 cents a dozen?
A. Not very many, probably 6 or 7 hundred cases.
Q. Then what did you sell after that?
A. I sold from 70 to 75 cents and 80 cents.
237 Q. When dil you sell them with reference to the 5th of February, 1908, did you sell any after February 5, 1908?
A. Yes sir.
Q. What did you get for them?
A. From 70 to 75 cents and 80 cents for a few.
Q. You sold the bulk of them between 70 and 80 cents a dozen?
A. Yes sir, the bulk at 75 cents, I should judge, some at 80 cents and a few at 70.
Q. And you sold them between February 5th, 1908 and what time?
A. Along in September, I think.
Q. And about how many cases did you sell between those two dates?
A. Somewhere in the neighborhood of 5,000 cases.
Q. Did you sell any at a less price than 70 cents?
A. I think not.

Direct examination of Mr. D. CAMPBELL resumed by Mr. DORR:

Q. I want to ask you a question I omitted on direct examination. Are you acquainted with the publication known as "The Pacific Fisherman"?

A. Yes sir.

Q. What is that paper?

A. It is a trade journal covering various kinds of trade news, salmon, fruit and other commercial interests.

Q. It is published how often?

A. I could not state right now; either monthly or weekly I do not know which.

Q. Do you take it?

A. Yes sir.

Q. Is it taken generally among the trade to your knowledge, or do you know?

A. I think it is.

Q. I hand you a purported copy of this Pacific Fisher
238 man, which bears date September, 1907, and ask you whether you can identify that as a copy of the paper as it was issued?

A. This is a copy of the Pacific Fisherman.

Q. For that month?

A. This is the September issue of the journal, September, 1907.

(Whereupon the witness was excused and left the stand.)

Mr. DORR: I now desire to read the deposition of Arthur E. Wadhams, if your Honor please.

(Whereupon Mr. Dorr taking the witness chair the following questions were read by Mr. Bruce and the following answers read by Mr. Dorr.)

Q. You may state your full name?

A. Arthur E. Wadhams.

Q. Where do you live, Mr. Wadhams?

A. At Blaine, Washington.

Q. How long have you lived at Blaine?

A. Since the spring of—since 1893.

Q. Have you in mind or contemplation anything that would take you away from Blaine or Whatcom county in the immediate future?

A. Yes sir.

Q. What is it?

A. I am going north to take charge of a cannery for Gould and Company.

Q. At what point?

A. At Kassan, Alaska.

Q. When do you expect to leave?

A. The twenty-second of this month.

Q. How long do you expect to be away?

A. About 7 months.

Q. What has been your business in the last 5 or 6 years?
239 A. The fish business.
Q. What particular part of the business?
A. The canning part.
Q. And where were you doing business in 1907?
A. For the Carlisle Packing Company at Lummi.
Q. What were you doing there that year?
A. I was cannery foreman.
Q. Do you know when your services commenced there as foreman?
A. I moved down there about March 9th.
Q. What year?
A. 1907.
Q. You were there throughout the summer?
A. Yes sir, until the pack was up.
Q. About when was the pack completed, do you know?
A. I do not know when it was completed.
Q. You were there all the summer, though?
A. I was, up until the time the pack was up; along about September.
Q. Are you acquainted with Frank Wright.
A. Yes sir.
Q. Do you know what relation he sustains to the Carlisle Packing Company?
A. Yes sir.
Q. What is it?
A. Superintendent and general manager.
Q. And what relation did he sustain at that time?
A. The same.
Q. Are you acquainted with E. B. Deming?
A. Yes sir.
Q. How long have you known Mr. Deming?
A. Ever since he came to the Coast, about 6 or 7 years ago, I do not remember exactly.
Q. Do you know what business he is in, or what companies he represents.
240 A. Yes sir.
Q. What are they?
A. The Pacific American Fisheries.
Q. Any other company?
A. Deming-Gould brokerage company.
Q. Do you know the particular relation he sustains to these companies, or did in 1907?
A. He was general manager of the Pacific American in 1907.
Q. Do you know what particular relation, if any, he sustained to the Deming-Gould Company?
A. No, I do not know what office.
Q. Did you hear any conversation between Mr. Frank Wright and Mr. Deming respecting the disposition of the pack of the Carlisle Packing Company for 1907?
A. Yes sir.

Q. Did you hear more than one conversation?
A. Yes sir.
Q. How many conversations?
A. I would say twice, with Mr. Wright.
Q. When was it—these conversations, when did they occur as near as you can tell?
A. Along in the spring of 1907; the first meeting was sometime in February, but as to the exact date I do not remember.
Q. When was the second meeting?
A. Either the latter part of February or the first week in March.
Q. Where were the conversations held?
A. In Mr. Deming's office.
Q. Who was present at those conversations?
A. Mr. Deming, Mr. Wright and myself.
Q. What was the subject discussed?

Mr. DORR: Mr. McCord, do you wish to read the objections?

241 Mr. MCCORD: No, go on.

Q. Go on and detail that conversation.
A. The first meeting Mr. Wright, Mr. Deming and myself were there and we talked over the can contract and the brokerage account.
Q. What was said?
A. Mr. Deming said he would handle the entire pack for 1907, that is all grades of fish, and take it all. He first agreed to take it over about the 1st of January of 1908, and after some discussion Mr. Wright agreed to let him take it over the first of February at the opening price; take the entire pack.
Q. And how was it to be paid for, what was said about the price?
A. He was to pay for it by February 1, 1908 at the opening price.
Q. Opening price for each grade?
A. Each grade of fish.
Q. When you heard the second conversation what was said?
A. Mr. Wright and I met just to tie up with them, and in the meantime we went to Alex——
Q. We do not care about that. You need not discuss that; but I understand the first proposition was in the nature of an offer, state what was said by Mr. Wright when Mr. Deming made that—at that first meeting?
A. That was all the conversation we had. Of course, there was a little talk that did not lead to this. I do not know exactly what it is, Mr. Deming and Mr. Wright did a little talking over the situation and Mr. Deming said he would take the entire pack at the opening price and pay for it on February 1st; that was his proposition.
Q. What did Mr. Wright say to that, if he said anything?
A. He did not say anything to that, he just asked for his proposition.
Q. When did you see him the next time?
242 A. There was several days between the first and second meetings. I do not know exactly how many days.
Q. What was said at the second meeting?

A. Mr. Wright just told Mr. Deming he would accept his offer and they talked it over again; the same thing.

Q. The same words were talked over—the substance of them?

A. Yes sir, the same substance.

Q. And at that time what did Mr. Wright say as to whether he would take that offer?

A. He said he would accept it. Mr. Deming mentioned, I believe, that he had no contract forms, but he would have them later. That was all the conversation they had at the second meeting referring to this brokerage account.

Q. Was anything said about the brokerage there—I want you to tell what was said about that, what was to be done?

A. The usual discount.

Q. What was that?

A. Five and one and a half.

Q. Was anything said about the storage or delivery?

A. They were to be accepted by February 1st.

Q. Was anything said about commissions, anything of that sort, if you remember?

A. Yes sir, that is the usual discount.

Q. Now, do you know anything about the fish having been delivered?

A. No.

Q. I believe that you stated that this was to apply to all grades?

A. All grades of fish, yes, at the opening price.

Q. What do you mean by the opening price?

A. The price is named usually about the time the pack is up.

Q. Do you know how that price is usually fixed, or who names it?

243 A. Usually Deming-Gould and the Alaska Packers—

Q. They get together and agree?

A. Yes sir.

That is all.

Cross-examination by Mr. McCORD:

(Questions and answers read as before.)

Q. During the year 1907, Mr. Wadhams, were you interested in the Carlisle Packing Company as a stockholder?

A. Yes sir.

Q. What interest did you have?

A. Well, I had about $6,000.00 that I put in the concern.

Q. How many shares of stock?

A. I forgot. I had two certificates that Mr. Wright turned over to me, but I do not remember the exact amount.

Q. What proportion of the whole stock; did you own a third or a fourth of it?

A. No, a small proportion.

Q. What was the capital stock of the Carlisle Packing Company?

A. At that time I believe it was $80,000.00.

Q. And you had about a tenth then?

A. Yes sir, about a tenth.
Q. Now, you say you had a conversation sometime in the spring of 07 with Mr. Deming and Mr. Wright?
A. Yes sir.
Q. And at that time Mr. Deming desired to handle the Wright ck during the season of 1907?
A. Yes sir.
Q. He wanted to handle it upon a commission basis, just as a okerage concern usually handles salmon packs?
A. Yes sir.
Q. And you understand and understood at the time by that 4 arrangement that Mr. Deming was simply to act as a broker in handling the pack for 1907?
A. As a buyer. He was a buyer and broker.
Q. His proposition was to handle it as a broker; that was the st part of the conversation?
A. Yes sir.
Q. And he wanted to handle the pack and be paid for it five and e and a half per cent commission and discount in the ordinary way which a broker handles a salmon pack, that was the first propo- ion, was it?
A. He was to take the entire pack, yes sir.
Q. That was his first proposition?
A. Yes sir.
Q. Then, I understand you Mr. Wright did not accept that?
A. He did not have anything to say at that meeting. That was s proposition, that he would take the entire pack at the opening ice.
Q. Now, as a matter of fact, Mr. Wadhams, did not Mr. Deming te that he would not take the entire pack at the opening price or y other price, but would agree to take it off Mr. Wright's hands, e sock-eye salmon, on February 1, 1908, if it had not been sold evious to that time?
A. No sir, he did not.
Q. Was it not expressly agreed that Mr. Wright should allow Mr. ening to handle his pack in the usual way as a broker with the rther understanding that on February 1st, if the sock-eye salmon d not been sold Mr. Deming would take it off his hands at the ening price?
A. No sir.
Q. You say he agreed——
A. To take the entire pack.
5 Q. Now, as a matter of fact, what you say about the open- ing price, you do not know how that is arranged, do you, cept from hearsay?
A. Through Mr. Deming and the Alaska Packers.
Q. You know nothing about how those opening prices are fixed of ur own knowledge?
A. I have never been at the meetings, but I know how it comes out.
Q. You know because you heard so?

A. Yes sir.

Q. Did you have any further conversation with Mr. Deming in regard to this matter?

A. No, only on the two occasions, that is all.

Q. Do you know whether Mr. Deming did take over on February first or about that time, the sockeye salmon?

A. No, I do not. I was not there at that time, you know.

Q. Nobody else was present at either of these conversations except you and Mr. Wright?

A. No sir.

Q. I thought you said some other Deming, Stewart or Arthur Deming, was there?

A. No, just Mr. Deming and Mr. Wright and myself.

Q. Where did these conversations take place?

A. In Mr. Deming's office.

Redirect examination:

Q. Have you any interest in the Carlisle Packing Company at this time?

A. Oh, no.

Q. Did you have any in February, 1908, or January, 1908?

A. No sir.

Q. You parted with your interest prior to that?

246 A. Yes sir.

Mr. L. P. BYRNE, being recalled on behalf of the plaintiff, testified as follows:

Direct examination by Mr. DOBB:

Q. When you were on the stand the other day you were asked regarding the making up of the statement, which has been identified as plaintiff's exhibit 16, purporting to show the proceeds of the sales of the salmon in controversy in this suit, I will not ask you whether, since you left the witness stand at that time, you have made any further checking or examination of the papers other than the books, and the books themselves, to verify that statement, and if so state to the Court what you have done?

A. I have made an index of this first sheet so that I could trace any item in there through the books.

Q. Have you checked the items back from the books?

A. Yes sir.

Q. Who worked with you, if anyone?

A. Mr. Waldo.

Q. Have you made any index to the pages of the books of account of the Carlisle Packing Company wherein these items are entered originally?

A. I did not catch it.

Q. Have you made any index to the books of the various books of the Carlisle Packing Company wherein these accounts were originally entered in the books?

A. Yes sir.

Q. Have you that index there?
A. Yes sir. (Witness hands counsel paper.)
Q. Is this the one that relates to the pages in the books?
247 A. That refers to the pages in the books.
Q. Have you one that refers only to the pages in the books without this other matter?
A. Yes sir.

Mr. McCord: I do not know that I understand the question.
Mr. Dorr: The court suggested the other day, and we promised in response to that suggestein, to furnish an index to the particular pages in the books where the transactions occurred.
Mr. McCord: I understand about that, but what about this other matter?
Mr. Dorr: He handed me the wrong paper that is all.

Q. Is this the index (indicating paper) to the books?
A. Yes sir.
Q. In those boeks somewhere, one of them, there is what purports to be a recapitulation statement that was discussed the other day when you were on the stand, I will ask if this is referred to in this index?
A. No sir.
Q. That is eliminated entirely?
A. Yes sir.
Q. What does this index show, what does it refer to in the books?
A. The pages and items in those various books mentioned there.
Q. Of the original entries?
A. Yes sir.
Q. And the recapitulation statement is not referred to here?
A. That is not referred to.
Q. I will now ask you whether you checked any other papers and data aside from the books in order to check the correctness of this statement?
A. I did.
Q. What did you check?
248 A. Orders and bank returns, correspondence, and letters, a little memoranda book of shipments—I cannot recall anything further now.
Q. Are you able to account for the disposition of how many cases of this salmon through these books?
A. May I refer to the statement to refresh my memory?
Q. Yes. (Witness examines statement.)
A. They account for the sale of 10,903 cases.
Q. Were any greater number involved in that?
A. Ten thousand nine hundred and twenty cases.
Q. What became of the other 17?

Mr. McCord: They are not in controversy here: they are not suing for the others.
The Court: That is all I understand they claim.

Mr. Dorr: We may want to amend to take in that 17 cases: 10,920 cases went into this warehouse and I wanted to show the dis-

position of that lot. That number does not agree with the warehouse receipts. There is a discrepancy of 17 cases.

The COURT: I think you might show that and eliminate this from the case. I think it is proper to show the elimination of those.

Q. What became of the other 17 cases?

A. A credit was given this statement for 6 cases of swells, and 11 cases, as near as I could check it out, were sent out as samples.

Q. And the actual sales covered how many cases?

A. Ten thousand nine hundred and three cases.

Q. Are you able to state to the Court and jury whether that statement which you hold in your hand, plaintiff's identified exhibit 16, is a correct statement of the transactions involving this lot of salmon?

Mr. MCCORD: I object to the question: the witness has not shown any qualifications on the subject, and it is incompetent,
249 irrelevant and immaterial, not the best evidence; the statement is made up from the books which are not introduced in evidence, and the books have not been sufficiently identified: there is no proof that they are a correct record of all the transactions of the Carlisle Packing Company with these defendants and other people.

The COURT: I understand he has checked back with the original papers. I think the object of this was not only to show that this statement corresponds with the books, but to go back and see if the books are correct as to the data in the office.

Mr. MCCORD: That is the way I understand it.

The COURT: He is not offering the books now, you will have an opportunity to cross-examine on this. (Last question read.)

Mr. MCCORD: That is asking for a conclusion.

The COURT: He is an expert bookkeeper. He is making up from the data a statement and he is now asked if this is a correct statement of the transactions involved in this suit, that is all I understand by that question.

Mr. MCCORD: I object to it as incompetent, irrelevant and immaterial, asking for a conclusion of the witness, not as an expert bookkeeper, but he is asking this witness to tell the jury that which they must find one way or the other, whether the amount involved is correct; that is asking him to decide the very question that is before the jury.

The COURT: I think it will be well to amend the question so as to make this tie in with the books, and I am inclined to think this objection might be well taken because that is not done.

Q. I will ask you whether you are able to check the amounts as far as the money transactions are concerned from the books themselves?

A. I am.

Mr. MCCORD: I move to strike that answer. That is not the proper way to get at the thing.

250 Q. Does your statement show the money transactions as they appear in the books?

Mr. MCCORD: I object to that as asking for a conclusion of the

witness, and asking him to pass on the money transactions, the very thing the jury is to pass on.

The COURT: I will let the witness testify on this statement, whether or not it is correct as a compilation from the books of the data in the books, the accounts in the books. I understand he says he checked up the books and also the data from which the books are made up.

Q. What is the fact about that?

A. I checked this up with the books and records I found.

Mr. McCORD: I move to strike the answer.

The COURT: I will let the answer stand. We will see what that comes from. Maybe I had a misunderstanding of what the witness had said.

Q. What is the net amount received from the sale of this salmon?

Mr. McCORD: I object to that as asking for a conclusion of the witness.

The COURT: As shown by the books?

Q. As shown by the books?

Mr. McCORD: He is not offering the statement in evidence, but asks for the matters contained in the statement.

The COURT: I understand it was made up from the books and data. I do not believe we would require him to read each item. I understand the rule in these cases to be that the books shall be identified, shown to be properly kept, and then an expert, in order to assist the jury, may make up a statement in some convenient form for the benefit of the jury. (Continued argument.)

The COURT: If this depends on the bank statement, of course, what he says now will have to be supported by that data,
251 the bank statement. Here is the data coming in from different directions, but if they do not complete it and go to offer the statement, then it will be excluded. (Last question read.)

Q. (Added:) As shown by the books?

The COURT: He may answer the question as amended.

A. Twenty-eight thousand, four hundred and fifty-eight dollars and twenty-five cents.

Q. In verifying the books did you have reference to the bank statement?

A. Yes, sir.

(Plaintiff's exhibit 30 marked for identification.)

Q. I hand you plaintiff's identified exhibit 30. (Witness examines exhibit 30.) Was all of the salmon paid for through the bank or collected through the bank or were there any lots that were not?

A. No, there was a few outside of the bank.

Q. Are they shown on the books too?

A. Yes, sir.

Q. What amount does that make, what were they?

A. Yes, sir.

Q. Without stating that, I want to ask how you arrived at it, what your method of procedure was?

A. I started with an amount calculated on the contract price of 90 cents a dozen.

Q. Less anything?

A. Less his label allowance, less his 1½% for cash discount, less 5% commission; I started with the net amount after making those deductions, $36,576.25.

The COURT: Ten thousand, nine hundred and three cases?

A. Ten thousand, nine hundred and fourteen cases, judge.

Q. How much is the label allowance you took off?

A. Two hundred and two dollars and seventy-seven cents.

Q. How much is the 1½% you took off?

A. Five hundred and eighty-six dollars and thirty-two cents.

Q. How much is the 5% you took off?

A. Nineteen hundred and twenty-five dollars and twenty-six cents.

Q. What is the net result left?

A. It is $36,576.25.

Mr. McCORD: Figuring on a basis of 10,914 cases?

A. Yes, sir.

Q. How did you proceed from that point?

A. I started with February 1, 1908, $36,576.25, the amount due; I figured interest on that until July 27, which is the date when there was a payment made of $561.46. I substracted that amount received from the balance of the amount due on February
254 1st, leaving $36,014.79; I computed interest on that balance until the date of the next receipt of money, which was on August 10th of the same year, 14 days, $3309.45.

Q. And you gave the amount of interest in each case when you came to it?

Mr. McCORD: I do not care about that. I want to know his rule.

The COURT: I think if he followed that method right on through you have the idea you are after.

Q. That was simple interest all the way through?

A. Yes, sir.

Mr. McCORD: You added the interest to the principal and deducted?

A. No, sir. I deducted the payment from the principal and computed the interest on the balance each time leaving the interest aside each time. I figured that interest at 8%, but at the bottom I made a deduction for the difference between 6 and 8% in a lump sum.

Q. You had originally figured it at 8%.

A. Yes, sir.

Q. And now you reduced it to 6%.

A. I reduced it to 6%.

Q. What is the net amount of that interest?

Mr. McCORD: Between what dates is it?

Mr. DORR: Between February 1st, 1908, and to-day.

A. The amount of that is $2,167.79.

The COURT: That goes to the collections on the sales of the pink salmon?

A. Yes, sir, to to-day.

The COURT: When you apply this you count the interest on the last balance?

A. This does not include that other interest on that little unpaid—this was only on the pink salmon proposition.

255 The COURT: After the last shipment was made and the return made you found the balance and applied that payment and found the balance?

A. Yes, sir.

The COURT: And added the interest on that to the other interest accumulated on that sum down to date?

A. Yes, sir.

Q. What did you find to be the difference between the net receipts from the salmon sold and the contract price as you have figured it less the label allowance and 1½ and 5%?

Mr. MCCORD: I object to that question. Counsel is asking him first to make up the statement and instead of introducing the statement in evidence he asks him to read from the statement something that is not in the statement.

The COURT: Is that in the statement?

Mr. DORR: Yes, sir.

The COURT: I think he is entitled to answer. (Argument.)

The COURT: I made it plain to counsel, I think, that this bank statement must be identified and go in with this. I am letting this witness testify on the assumption that link or part of the evidence will be put in to make this good. I think the court has discretion in this matter and I am doing this to expedite matters. (Last question read.)

A. Eight thousand one hundred and eighteen dollars.

Q. What did you find was paid, if anything, for warehousing this lot of salmon, and insurance?

Mr. MCCORD: I object for the same reasons. The question is improper for the same reasons given heretofore.

The COURT: I do not understand that is involved through the bank is it?

Mr. DORR: No, your Honor.

256 Mr. MCCORD: I object to it as being incompetent, irrelevant and immaterial, not the best evidence.

The COURT: On that feature I am not satisfied as to the law, but I want the facts in this record and we will consider that later. (Question read.)

A. As to that warehouse bill, I would not testify that bill was to cover all these fish, these particular fish. The warehouse bill as shown here is $1,706.84. They have included some other fish.

Q. And you took that bill as you found it?

A. Yes, sir.

Q. What evidence did you find of the payment of that bill?
A. A cancelled check and receipted vouchers?
Q. From whom?
A. The Bellingham Warehouse Company, if I remember the name right.
Q. What is that $684.35? (indicating).
A. Interest on past due payments, a portion of the 1907 pack.
Mr. McCord: Then those amounts you found paid in February, 1908, the principal, the original amount?
A. All except $56.21, unpaid interest.
Mr. McCord: You have figured interest on that interest from February 1st, down to the present time?
A. From February 5th to May 2nd.
Mr. McCord: You figured interest on the interest, then?
A. Yes, sir.
Mr. McCord: You compounded that?
A. That is not compound interest.

Mr. Bruce: That will properly draw interest from February 5th.
Mr. Dorr: We took the account on the 5th of February and found so much due and figured simple interest from that time.
The Court: You may proceed.

257 Q. Did you figure interest on the warehouse bill?
A. Yes, sir.
Q. From what date?
A. From the date it was paid.
Q. At what rate?
A. First at 8% and then I reduced it to 6% in the general summary.
Q. What is the interest on that particular item of 6% per annum from the date it was paid to this date?
A. If I have not made a mistake in calculation it is $115.54.
Q. What is the principal of it?
A. Seventeen hundred and six dollars and eighty-four cents, that is figuring from the date it was paid to this date.
The Court: That is insurance?
A. That is insurance, warehouse charges, etc.
The Court: That meant the two?
A. Yes, sir, it included both in the same bill.

(Whereupon court adjourned until the hour of 9:30 A. M. on the following day, at which time court was opened pursuant to adjournment, all parties being present as heretofore, counsel for both plaintiff and defendants conceding the jury present, the trial proceeded.)

Mr. L. P. BYRNE was recalled to the stand; the direct examination by Mr. Dorr was resumed as follows:

(Plaintiff's exhibit 31 marked for identification.)

Mr. DORR: If your Honor please, I hold in my hand the statement of the First National Bank of this city, as testified to by Mr. Purdy, president of the bank, showing a true account of the books of the bank with respect to the collections made by the bank in the re-sale of the salmon in controversy. It has been stipulated by the counsel for plaintiff and defendants that this statement may be admitted as such without recalling the witness Purdy to the stand.

258 Mr. *McC*ORD: Mr. Purdy was in this morning and said it was a true statement. I do not stipulate that it is correct, but I admit that Mr. Purdy would so testify that it was a correct statement from his books.

Cross-examination of Mr. L. P. BYRNE by Mr. McCORD:

Q. I will ask you whether these interest charges for the salmon sold prior to February 1, 1908, were entered on the books of the Carlisle Packing Company?

A. They are not entered on the books.

Q. There is nothing on the books to show they had made any charge for interest?

A. No sir, not for interest.

Q. And from what source did you get the information there was any interest?

A. From instructions given me.

Q. What instructions?

A. From Mr. Waldo.

Q. Who is Mr. Waldo?

A. Mr. L. O. Waldo.

Q. What connection——

A. In checking over this thing. I stated I did not make this statement. I checked it, the statement that was presented.

Q. Do you know how long Mr. Waldo has been connected with the Carlisle Packing Company?

A. No sir.

Q. Do you know, as a matter of fact, that in 1907 he was living in town and had nothing to with the Carlisle Packing Company?

A. I know he was here.

Q. He was not the bookkeeper in 1907?

A. No sir.

Q. Has no entries been made in the books of the Carlisle
259 Packing Company in regard to the interest or unpaid balances prior to February 1, 1908?

A. No sir.

Q. There never has been down to the present time?

A. I could not testify to that.

Q. They are made up of a great many items, are they not; the aggregate of them is made up of a number of items?

A. Yes sir.

Q. No item is entered in the way of interest?

A. None that I found.

Q. The books do show the amounts of the original sales of the goods, that is on the books, is it not?

A. Yes sir.

Q. But no interest charge is made anywhere?

A. Not that I found.

Q. When were those entries made: were they made at the time the goods were sold?

A. I should judge at the time the sales were made.

Q. I wish you would look and see when they were made? (Witness examines books.)

A. The first charge appears under date of October 4, 1907.

Q. How does it read, just read the entry.

A. Deming & Gould to pack of 1907, 700 cases of Oak Leaf sockeye flats, $1.80 a dozen, 600 cases of Sport sockeye flats $1.80 a dozen, 400 cases of Sport sockeye half flats $1.10, 50 cases Oak Leaf sockeye flats, $1.10 a dozen, less 1½% and 5%, total amount $10,610.40.

Q. On the next page, 145, you have another item?

A. Yes sir.

Q. What is that?

A. Deming & Gould to pack of 1907, total $3,410.81.

260 Q. That is for sockeyes is it?

A. Half flat Humps, Stork and Nile.

Q. Those two items aggregate about $15,000.00?

A. That would be $14,000, and some odd dollars.

Q. When was the date of the bill of lading dated for that item of $10,610.40 on October 4th?

A. I did not see the bill of lading for that.

Q. You do not know?

A. No sir.

Q. How did you compute the interest on that item?

A. I took October 4th as the date of shipment.

Q. Why did you take October 4th as the date of shipment?

A. That was the date in the journal.

Q. The date it was charged up?

A. The date it was charged up.

Q. You assume that?

A. Yes sir, that that was the date of shipment.

Q. There is nothing on the books of the Carlisle Packing Company to indicate the date of shipment?

A. Nothing only what I saw.

Q. You never saw any bill of lading or any copy of it?

A. No sir.

Q. You do not know when it was shipped of your own knowledge?

A. No sir.

Q. All of the salmon that has been entered there are charged to whom, Deming-Gould Company?

A. Yes sir.

Q. All of them are charged to Deming-Gould Company?

A. Yes sir.

Q. And in computing that interest I want you to point out how you did that?

261 A. I took $10,610.40, with October 4th as the date of shipment.

Q. Did you compute the interest from October 4th?

A. It was due in ten days according to my information, the payment was due on that in ten days. On October 7th there was a payment of $5,684.80; that was within the ten days. On October 12th there was a payment of $4,165.42. On October 14th there was a payment of $1,262.25, cleaning up the balance of that $10,610.40.

Q. State the rule, how you figured it, without referring to the items. How did you compute the interest?

A. On the balances unpaid for the number of days they ran over the ten days.

Q. Then when a payment was made did you add the interest that had accumulated up to the time?

A. No sir.

Q. Then you added the total of the interest?

A. No sir.

Q. You computed the total of the interest?

A. Yes sir.

Q. Then when you added the interest to the principal and made your deductions you did that to tell what was left?

A. I did not add the interest to the principal until the wind up.

Q. The last of these payments was made on February 5th, was it not?

A. February 5, 1908, yes sir.

Q. And it was all paid but $56.21, principal?

A. Yes sir.

Q. That represents the difference between the 920 cases and 914 cases, does it not?

A. No sir, this had nothing to do with that.

Q. How did you get that $56.21?

A. That was left over on the 5th of February in the books here.

Q. Turn to February 5th in the cash book; (witness com-

262 plies) that shows Deming-Gould credited with what?

A. It shows a credit of $51,731.33.

Q. That is under the name of Deming-Gould Company?

A. Yes sir.

Q. And on the ledger account it is carried as Deming-Gould Company?

A. Yes sir.

Q. All the moneys credited were credited to them, and all goods sold were shipped to them?

A. There was one item of $10,000, and some odd dollars credited to the Pacific American Fisheries.

Q. Was that credited back?

A. Transferred back?

Q. Transferred back to Deming-Gould Company, was it—when was the transfer made?
A. It shows here March 16, 1908.
Q. So it is all carried and put on the books in the name of Deming-Gould Company?
A. Yes sir, Deming-Gould Company.
Q. On February 5th was there any entry of interest made that had accumulated prior to that time?
A. Not that I found.
Q. In making up the statement you have identified, you resorted to the books, letters and information that Mr. Waldo gave you, didn't you in order to make that statement?
A. Yes sir.
Q. You could not make a statement such as that from the books alone, until you had the other data?
A. I could make the summary of the net returns from the books.
Q. Of the salmon sold and money returned?
A. Yes sir.
263 Q. What information did you have to get then outside the books?
A. The information on the contract price.
Q. And by whom was that given to you?
A. By Mr. Waldo.

(Whereupon the witness was excused and left the stand.)

Mr. L. O. WALDO, being called as a witness in behalf of the plaintiff after being first duly sworn testified as follows:

Direct examination by Mr. DORR:

Q. Please state your name?
A. L. O. Waldo.
Q. Your occupation?
A. Cannery business, fishing business.
Q. What company are you connected with?
A. The Carlisle Packing Company.
Q. What is your age?
A. Forty-seven.
Q. How long have you been connected with the plaintiff company?
—. A little over one year.
Q. What were you doing prior to that time?
A. I was in the saw mill business.
Q. In what capacity?
A. Manager of the B. B. Lumber Company plant.
Q. Where?
A. In Bellingham.
Q. How long had you been engaged in that business?
A. Practically all the time for about 20 years; the previous 20 years.
Q. In what capacity generally?

264 A. Manager of lumber plants.

Q. Large or small?

A. Both large and small.

Q. Have you had to do with books of account during all those 20 years?

A. Yes sir, more or less all the time.

Q. Are you familiar with an ordinary set of books such as is kept by the Carlisle Packing Company?

A. Yes sir.

Q. What, if anything, did you do toward checking up a statement for this suit, this case, from the books of the Carlisle Packing Company?

A. I made up a statement of the pink flats in question.

Q. When did you do that?

A. Along late in the summer. I think probably in September, 1909.

Q. How soon was that after the sales were completed?

A. It was immediately following the shipment of the last car.

Q. Were you then in charge or engaged with the Carlisle Packing Company?

A. Yes sir.

Q. In what capacity?

A. I was acting as assistant to Mr. Wright,—superintendent.

Q. Is that the capacity you are still acting in?

A. Yes sir.

Q. Were you here when these last goods were shipped out?

A. I was there when the last three shipments were made.

Q. Do you have personal knowledge of those transactions?

A. Yes sir.

Q. You say immediately after the last shipments you made up the statement?

A. Yes sir.

265 Q. Is that the statement that Mr. Byrne has been testifying to, or is it a different statement?

A. It is the same statement, practically the same statement.

Q. Did you at any time go over these books with Mr. Byrne?

A. Yes sir.

Q. When did you do that?

A. About two weeks ago.

Q. State what you did in connection with working with him?

A. We took a copy of the statement I had made originally and Mr. Byrne checked that over with me. I assisting him in finding the entries to expedite the work, and we made this present statement.

Q. Have you at any time since that time re-checked the work?

A. Yes sir.

Q. When did you do that?

A. Saturday afternoon, and Sunday, last.

Q. Who worked with you?

A. Mr. Byrne.

Q. Have you personally checked over the entries on the books of the Carlisle Packing Company that relate to this transaction?

A. Yes sir.

Q. Have you checked the sales and payments relating to the salmon that was previously disposed of of the 1907 pack?

A. I do not think I understood the first part of that question.

Q. Aside from this salmon that is in controversy in this case, there was other salmon sold, as I understand it, from that same pack to the defendants, or some of them, early in the season; did you examine the books to ascertain the dates of those sales and the dates that certain payments were made in connection with such sales? That has nothing to do with this present lot of salmon, but it is the previous sales I am talking about, for which interest charges were made here?

266 A. Yes sir, I checked the dates of shipments and the dates of payments on the sales of the 1907 pack, other than the 10,920 cases.

Q. Did you do that with Mr. Byrne?

A. Yes sir.

Q. I will ask you to state, Mr. Waldo, whether you know—if you know whether the statement prepared, being plaintiff's identified exhibit number 16, is a correct statement, as shown by the books of the plaintiff Company, regarding the transactions in controversy in this suit?

Mr. McCord: I object to that on the ground it is not the best evidence. The best evidence of when the shipments were made is the books. There is nothing in this evidence to show that the books have been correctly kept or that it is a complete set of books. He is getting this in evidence without showing the correctness of those books.

The Court: This is going to the abstract, assuming the books are correct for the purposes of this question. The objection is overruled. (Exception allowed the defendants.)

A. Yes sir.

Mr. McCord: I object on the further ground that it is incompetent irrelevant and immaterial.

The Court: Overruled.

Q. I hand you a statement, which has been marked for identification as plaintiff's identified exhibit 16, and ask you to state what that is, if you know?

Mr. McCord: I object to that, asking what it is, saying it is a statement—I make the same objection I have been making as incompetent, irrelevant and immaterial and not the best evidence.

Q. I will change the question: is that the statement you have referred to in your testimony?

A. Yes sir.

267 Q. You have a shipping book containing receipts for salmon shipped?

A. Yes sir.

Q. You have it here?

A. Yes sir.

Q. Will you produce it? (Witness complies.)

A. This is the one. (Indicating book.)

Q. Does that cover the shipments of the 1907 pack from the cannery of the plaintiff?

A. Not all of them.

Q. Does it cover any of them?

A. It covers the shipments of the pink flats.

Q. And that book does not cover the others, does not go back to the others?

A. No sir. There may be some of the others in there.

Q. Look and see if there are. I want to find out the method of handling that?

A. There are some shipments of other portions of the pack, the first date being October 31, 1907.

Q. That is the beginning of the book is it?

A. Yes sir.

Q. Explain the method of keeping the receipts of the shipments?

A. As the shipments were made from the cannery they were shipped up and delivered to the boat and the purser or captain signed the shipping receipt for the goods. That is the shipping receipt.

Q. Is there any receipt on the book itself, the pages of the book, for these shipments, the name of the purser or anybody written there?

A. Yes sir.

Q. Just refer to the receipts for the shipment of this salmon that is in controversy, from the cannery? (Witness takes book.)

268 A. There are a number of them.

Q. When was the first shipment made, that is, from the cannery to the warehouse, as I understand you?

The COURT: Speaking with reference to the pink flats?

Q. Yes, that is the pink flats?

A. December 8, 1907.

Q. Who were they consigned to, shipped to?

A. They were shipped to the Pacific American Fisheries, Bellingham Warehouse Company.

Q. Care of the Bellingham Warehouse Company, is it not?

A. Yes sir, care of the Bellingham Warehouse Company.

Q. And what does this name Daniels, mean?

A. That is the captain or purser of the Utopia; he is the purser.

Q. How were these goods shipped?

A. By the steamer Utopia.

A. Can you show the other shipments there of these pink salmon?

A. The steamer Utopia, December 22, 1907.

Q. Who were they consigned to?

A. Pacific American Fisheries, South Bellingham, 444 cases of pink flat salmon.

Q. Was there any other salmon shipped at that time?

A. Yes sir.

Q. What kinds?

A. Cohoe flats and pink talls labeled and unlabeled.

Q. What were these two up here? (Indicating.)

A. Pink talls.

Q. All shipped together?
A. Yes sir.
Q. And all consigned to——
A. The Pacific American Fisheries?
Q. Where?
269 A. South Bellingham.
Q. Who signed that receipt?
A. J. Daniels, the purser of the Utopia.
Q. What is the date of that one?
A. December 22, 1907.
Q. Have you found another one?
A. Yes sir.
Q. What is the date?
A. December 29, 1907.
Q. What was shipped there?
A. There was shipped 2708 cases of pink flat salmon "carrier" brand.
Q. Was there any other salmon with that shipment?
A. Yes sir.
Q. What kind?
A. Talls unlabeled.
Q. Did that go on the same steamer, on the same trip?
A. Yes sir.
Q. Who receipted for it?
A. Daniels, the purser of the Utopia.
Q. Go ahead with the next one, what is the date of that?
A. January 1, 1908, steamship Utopia, consigned to the Pacific American Fisheries at South Bellingham, 2132 cases of flats unlabeled.
Q. Any other kind of salmon with them?
A. Yes sir.
Q. What kind?
A. There are 1155 cases of talls unlabeled.
Q. What steamer did they go by?
A. The Utopia.
Q. The same purser?
270 A. Yes sir.
Q. Go ahead with the next one.

Mr. McCORD: I object to this class of testimony, reading into the record a book there that has nothing to do with this case.
(Argument.)
Mr. DORR: It is not the purpose of this testimony to show the interest dates, it is the purpose of this testimony to show the delivery of the salmon.
The COURT: I understand one of the issues is the delivery of the salmon.
Mr. DORR: And they deny that it was delivered at all.
Mr. McCORD: The salmon was stored in the warehouse of the Bellingham Warehouse Company and warehouse receipts issued to the Carlisle Packing Company, which he immediately took and deposited with his banker, and endorsed them and borrowed money

on the receipts. It makes no difference whether those goods were sent to Bellingham or not.

The COURT: I suppose the plaintiff has some theory on that matter. I think it is competent.

Mr. McCORD: I object to his testifying from the book. There is no proof of the correctness of the book, there is no proof of the signature of the transportation company, and I object to any further testimony of that kind and move to strike out all that has gone in on the grounds stated.

The COURT: I think this book was testified to by Mr. Wright and Mr. Waldo.

Mr. DORR: I do not think Mr. Wright did, but Mr. Waldo has and he has identified the signature of the purser of the steamer.

The COURT: If there is any question about this being one of the books of the plaintiff, you can go into that matter and find out.

Q. I ask what this book is, if you know?

271 A. It is a shipping book and what I found with the books of the Carlisle Packing Company, as a shipping book, covering the entries of salmon shipped in 1907 and 1908.

Mr. McCORD: Mr. Waldo has already testified that he knows nothing about the books, that he did not go there until 1909, that he was living in Bellingham at the time that book was made, running a saw mill.

Mr. DORR: I will dismiss this witness for a moment and recall Mr. Wright.

(Whereupon the witness was withdrawn from the stand.)

Mr. FRANK WRIGHT, being recalled on behalf of the plaintiff, testified as follows:

Direct examination by Mr. DORR:

Q. I hand you this book and ask you to state what it is, if you know?

A. The Carlisle Packing Company shipping book.

Q. Covering what season?

A. The 1907 pack; it runs into 1908, the shipments.

Q. Where did this book come from, to the court house here?

A. From the Carlisle Packing Company's office.

Q. Has it been there continuously?

A. Yes sir.

Q. Are you familiar with the book itself?

A. Yes sir.

Q. Do you know how it was kept and what it was kept for?

A. It was kept for the shipments. Every shipment was entered in this book with the purser's signature.

Q. Do you know the signatures that purport to be signed to those receipts by the officers of the steamer Utopia.

272 A. Yes sir.

Q. The purser's signature?

A. Yes sir.

Q. Can you idenify them yourself?
A. Yes sir.
Q. Did you see him sign any of them?
A. Yes sir.
Q. How long has he been coming over there?
A. Mr. Daniels has been on about 4 years; I know all the pursers personally.
Q. Do you know him personally?
A. Yes sir.
Q. Can you swear whether or not the signature purporting to be written by Daniels is his signature on those receipts?
A. Yes Yes sir, that is his signature, I am familiar with it.

Mr. DORR: I will hand the book to his Honor. (Does so.)
Mr. MCCORD: It is just a shipping receipt to the Carlisle Packing Company on the steamers.

Q. Where were these goods, were they on the premises of the Carlisle Packing Company before they were shipped?
A. Yes sir they were in the Carlisle Warehouse before they were transferred.
Q. Where was that warehouse located?
A. The warehouse is under the same roof with the cannery.
Q. What is the size of that warehouse?
A. It is about 300 by 150, with an "L" on it 50 by 100. I think that is the size of it.
Q. And I understand the fish was stored in this warehouse?
A. Yes sir.
Q. Were they safe there?

Mr. MCCORD: I object. If they were safe or were not, it makes no difference.

A. It is all over the land and perfectly safe.
273 Q. What do you mean by over the land?
A. No part of the warehouse is over the water and it could not fall through and be lost.
Q. What was the effect of keeping the salmon stored over the water?
A. If a wharf breaks down and goes into the water the insurance companies will not pay any loss, it is only insured against fire.

Cross examination of Mr. FRANK WRIGHT by Mr. MCCORD:

Q. You say you had these goods in your warehouse over at Lummi Island?
A. Yes sir.
Q. And you had a warehouse there?
A. Yes sir.
Q. And that warehouse issued warehouse certificates against this salmon?
A. Yes sir.
Q. And those warehouse certificates were at the time of these shipments in Mr. Purdy's bank?
A. I think all of them.

Q. And you had an arrangement with Mr. Purdy by which the goods were to go in the Bellingham Warehouse Company's warehouse and their receipts were to be substituted for your warehouse receipts?

A. Yes sir, up to the first of February, until they were paid for.

Q. I mean at the time the shipments were made, you told Mr. Purdy you would send the goods over to the Bellingham Warehouse Company's warehouse and as soon as you got that warehouse's receipts you would put them in the bank and take up your own?

A. Yes sir.

Q. And that was agreeable to him?

A. Yes sir.

Q. So all these goods were consigned and went to the Bel-
274 lingham Warehouse Company?

A. The 10,000 cases in this suit did.

Q. Went to the Bellingham Warehouse Company?

A. Yes sir, the others, a good part of them were shipped.

Q. But the salmon in controversy, no matter whether they had the name of the Pacific American Fisheries, consignee, on them or didn't, continued to go to the Bellingham Warehouse Company and did go there and warehouse receipts were given to you and you took them over to Mr. Purdy according to your agreement.

A. They were put there to expedite the shipments.

Q. I ask if that was not what you did, you carried out your agreement with Mr. Purdy and delivered the goods to the Bellingham Warehouse Company and took receipts and turned them over to Mr. Purdy as you agreed?

A. If you will ask the question over again and separate it.

Q. If you will answer my questions I will try to put them so you will understand. I say these goods were stored in your warehouse at Lummi Island; you had warehouse receipts issued against them and they were deposited with Mr. Purdy as security; you made an agreement with Mr. Purdy by which you would ship the goods to the Bellingham Warehouse Company, to facilitate shipments, if you please, and agreed with him that you would get the receipts from the Bellingham Warehouse Company and take up your own receipts and you did so and delivered them to him?

A. Yes sir.

Redirect examination of Mr. FRANK WRIGHT by Mr. DOBIE:

Q. What did you do that for?

Mr. McCord: I object as immaterial.

Q. I will ask you this question then, did Mr. Deming have anything to do with that matter?

A. Yes sir.

275 Q. What?

A. He asked me to do it.

(Whereupon the witness was excused and left the stand.)

Mr. L. O. WALDO, being recalled, testified as follows:

Direct examination (resumed) by Mr. DORR:

Q. You will now proceed with that book (hands witness plaintiff's identified exhibit 34) and show the court and jury the dates of shipment of this pink salmon which is in controversy from the Carlisle Packing Company's warehouse to Fairhaven.

Mr. McCORD: I object to all this testimony as incompetent, irrelevant and immaterial and not the best evidence, and hearsay.

The COURT: He may answer. (Question read.)

Q. Name the date of shipment of any of this particular lot of salmon?

A. December 8, 1907.

Q. To whom was that consigned?

A. The Pacific American Fisheries on account of Bellingham Warehouse Company.

Mr. McCORD: Account of? Care of, is it not?

A. "ac."

Q. What part was shipped at that time, what quantity of this salmon?

A. Seventeen hundred and thirteen cases.

Q. Was any other salmon shipped with it?

A. Yes sir.

Q. How much other salmon?

Mr. McCORD: You asked these same questions before.

Mr. DORR: I am going to shorten this up.

A. Fifteen hundred and ninety-three.

276 Q. Turn to the last shipment?

A. January 10, 1908.

Q. How much was shipped on that date?

A. It was 2292 cases, all together.

Q. Was any other salmon shipped with it?

A. Yes sir.

Q. How much?

A. Two hundred and twenty-one cases.

Q. To whom was that consigned?

A. The Pacific American Fisheries, South Bellingham.

Q. By what steamer did it go?

A. The steamer Utopia.

Q. Can you state whether on and between the first and last dates given all this lot of salmon in controversy was shipped over from the Carlisle Packing Company's warehouse?

A. Yes sir.

Q. Was it?

A. Yes sir.

Q. What is that paper? (Hands witness paper.)

A. It is an index, 1908 and 1909 journal of the Carlisle Packing Company, also the 1907 ledger, 1908 ledger, 1909 ledger.

Q. You made it up, did you?

A. Mr. Byrne made it up, I assisting.
Q. You and Mr. Byrne together?
A. Yes sir.
Q. And to what pages in these books does it refer?
A. It refers to the pages and items that are referred to in that statement.
Q. Affecting this account in this suit?
A. Yes sir.

277 Q. In those books there is one page that was discussed the other day containing a re-capitulation of the account, is that referred to here?

A. No sir.
Q. That is eliminated entirely?
A. Yes.

Mr. DORR: I will ask that this index be identified. (Marked plaintiff's identified exhibit 32.)

Mr. DORR: We now offer this index, being identified as plaintiff's identified exhibit 32, together with the accounts in the books referred to, which have been testified to in this case, relating to the transactions and the account of the transactions with respect to the salmon that is in controversy in this action.

Mr. MCCORD: I object to the offer as made for the reason it is irrelevant, incompetent, immaterial, not the best evidence, and I particularly refer to the portions of the books that are offered in evidence. I object to those as irrelevant, incompetent and immaterial, not the best evidence, no sufficient identification of the books has been shown, no proof that the books have been correctly kept, no proof by any competent bookkeeper as to the correctness of the books; no proof of the fact that the books contain the entries made and all of the entries made by the Carlisle Packing Company during the period purported to be covered by the books; for the further reason that the testimony shows the books are not correctly kept, but are incorrectly kept and that the books are not a complete record of the transacions between the Carlisle Packing Company and its various customers with whom it deals. I object to the statement for the same reasons, and the mere fact that some of the witnesses have testified that this particular account is correct is nevertheless based upon the correctness of the books and the correctness of that account in the books, which they say they have verified from time to

278 time. Before the Court rules I would like to ask one or two questions.

The COURT: Very well.

Cross-examination of Mr. L. O. WALDO by Mr. MCCORD:

Q. You are not a bookkeeper?
A. I never followed that as a profession.
Q. When did you go to work for the Carlisle Packing Company?
A. April, 1909.
Q. You have never checked over all the accounts; the only account you have purported to check was this one?

A. I have gone over other accounts possibly, but I have not checked all the books.

Q. As a matter of fact, last summer several times you had to have expert bookkeepers to come over and try to straighten out the books, by reason of the fact that they were inadvertently kept?

A. Not last summer.

Q. When was it?

A. We had them checked up after the pack was up.

Q. You had them checked up by an expert bookkeeper?

A. Yes sir, audited.

Q. You and Mr. Wright, not knowing anything about the books had to get somebody to straighten them out?

A. That was not the case.

Q. That was a fact, you could not make up a statement until you got an expert bookkeeper to straighten them up; you got Mr. Byrne to do it?

A. We had a man named Elkan audit the books as is usually done at the end of a year.

Mr. McCORD: I insist upon my objection.

Redirect examination *by* Mr. L. O. WALDO by Mr. DORR:

Q. What is this done for, this auditing?

A. So as to have the correctness of the books certified to,
279 to show they were right.

Q. For whom?

A. For the benefit of the officers and stockholders of the company.

Q. Is that not the custom in other corporations that you have been connected with?

A. It is.

Q. To call in an outside expert to determine and certify the correctness of the books for the satisfaction of the stockholders?

A. Yes sir, it is necessary where bonds are given by the employees.

Mr. DORR: We insist upon our offer.

The COURT: I understand this offer is limited to so much of the books as pertains to the transactions in controversy?

Mr. DORR: It is, and the index shows those pages.

Mr. McCORD: I want to add another objection, that the books are not the best evidence.

The COURT: The objection is overruled, the books and exhibits identified and offered at this time will be admitted, each of them. (Exception allowed defendants.)

Mr. DORR: I now offer the identified exhibit 16, this abstract.

Mr. McCORD: I make the same objection to the abstract.

The COURT: The objection is overruled, the exhibit is admitted.

Mr. DORR: The plaintiff now offers the September, 1907, copy of the "Pacific Fisherman," the trade journal which has been identified by the witnesses who have testified to it, and especially that portion of it on page 30 entitled "Salmon prices announced."

Mr. McCORD: I object to it as incompetent, irrelevant and immaterial, not the best evidence, not proper evidence at all, tending to prove any issue in this case.

The COURT: I understand the offer is in connection with the announcement of prices?

Mr. DORR: Yes sir, that is what the article says.

280 Mr. McCORD: I object on the ground it is hearsay, not tending to bind the defendants in this case.

The COURT: The exhibit will be admitted.

(Plaintiff's exhibit 33 marked for identification.)

(Plaintiff's exhibit 34 marked for identification.)

Mr. DORR: I now offer in evidence the shipping book that has been identified by Mr. Wright and Mr. Waldo, with respect to the shipments of the salmon in controversy from the Carlisle Packing Company to South Bellingham.

Mr. McCORD: I object as incompetent, irrelevant and immaterial not the best evidence, not properly identified and wholly immaterial. It just shows the shipment from Lummi Island to South Bellingham and has no materiality whatever.

The COURT: It may be admitted.

Direct examination of Mr. O. WALDO by Mr. DORR (resumed):

Q. Referring to the bill of the Bellingham Warehouse Company of August 1, 1909, plaintiff's identified exhibit 21, how much of that bill was for insurance, if you know?

Mr. McCORD: I object to that, it shows on the face of it.

Mr. DORR: I want to segregate the insurance from the warehouse bill.

Mr. McCORD: It is segregated on the bill, is it not?

The COURT: If it is all right as it is, let it stand, but if it is not so segregated we want it done. (Court examines exhibit 21.) I do not understand whether or not these items pertain to this particular salmon, that is one thing I want to suggest at this time before I forget it. If this is not segregated I want it done, and if it is on the face of it let it be pointed out, which are the items; let him answer.

Q. How much of that $1,706.84 was for insurance?

A. The item of $4.85, $301.37; I am not sure, but I think the item of $6.38.

281 Q. Can you tell whether there are any amounts involved in this bill for storage on other salmon than the particular salmon which is in controversy here?

A. Yes sir.

Q. Can you segregate that?

A. Yes sir.

Q. You may do so?

A. There is one item of $272.82, which is for storage to February 5, 1908, on warehouse receipts number- 9, 14, 15, 16, 17 and 18.

Q. And those lots of salmon were not the ones in controversy?

A. Yes sir.

Q. Is that all of the outside or different warehouse charge?
A. Yes.

The COURT: I want you to have this witness place a check mark of some kind before the items you claim pertain to the items in question. If this goes before the jury I want them to know which are in and which are out and they should be identified.

Q. Well, check the items with a red pencil that cover the storage on this salmon that is in controversy.

Mr. McCORD: I object to the exhibit being mutilated by any such marks calling attention to any part of the testimony. I think it amounts to a comment upon the facts, and I do not believe it will result in any advantage to the jury. I make this objection reluctantly because the suggestion is made by the Court, but I think it is my duty to my clients to do so. I object to the Court's making any statements commenting on the testimony. I know the Court does not intend to do anything of the sort, but I fear it will be prejudicial to the parties, maybe to one and maybe to the others, but I object to it.

The COURT: The court is not commenting on the evidence. The evidence shows that certain items are in the paper which are
282 held pertaining to the salmon in controversy, and some that is not in controversy, and that paper in that shape would confuse this jury. The different items which he claims go in should be designated by some mark or there must be some other statement made out. I do not understand that is commenting on the evidence.

Mr. McCORD: I object to the remarks just made by the Court and take exception.

Mr. DORR: The plaintiff offers to do it in either way. The exhibit offered is a receipted bill by the warehouse company; it contains several different items. I ask that the items that cover the warehouse charges on this particular lot of salmon in controversy be indicated.

The COURT: The court will instruct this witness how to do it. Take a red pencil and note opposite each item you claim from your testimony affects this salmon in controversy with a letter "I," opposite the item on the right, opposite each item you claim applies to this salmon, the 10,900 cases. As to each item you claim is not in there, *but* a letter "O" opposite that.

(Witness complies with directions of court.)

Mr. McCORD: I object to the remarks of the Court and the directions of the Court to the witness as being an emphasis of certain parts of the testimony, amounting to a comment on the testimony before the jury.

The COURT: The letter "I" means in for those that he claims are in in this controversy, and the letter "O" means they are out according to his contentions.

Mr. DORR: I now offer in evidence plaintiff's identified exhibit number 21. I intend that to apply both to the insurance and warehouse charges; whether the witness understands it that way, I do not know. Did you so understand it, Mr. Waldo?

A. Yes sir.

283 Cross-examination of Mr. L. O. WALDO by Mr. McCORD:

Q. I will ask you what you mean by the letter "O" after the item of $301.37?

A. That item is marked out as not referring to the 10,920 case lot.

Q. You mean that has nothing to do with the insurance on the 10,920 cases of salmon?

A. Yes sir.

Q. The salmon in controversy?

A. Yes sir.

Q. And the $6.38 has nothing to do with it, the first item?

A. No sir.

Q. And the $4.85 has nothing to do with it?

A. No sir.

Q. And the $976.66, marked with the letter "I," what do you mean by that?

A. That is included in the 10,920 cases in controversy.

Q. Does that include any portion—$976.66, does that include the entire shipment, the entire storage from the time the goods were delivered to the warehouse until it was taken out, or from February 1st?

A. It does not include it.

Q. How much of the $976.66 is for storage prior to February 1, 1908, and how much is for storage subsequent to February 1, 1908, are you able to tell?

A. It is not segregated here.

Q. I wish you would segregate it, compute it?

A. I do not know that it can be figured out from this statement.

Q. I wish you would figure it out from any information you have or can get, if you know, or can find it out?

A. I cannot separate the item $976.66. I cannot separately show what part was prior to February 5th and what was after February 5th.

284 Mr. McCORD: I particularly object to the introduction of that item because it covers according to the witness's testimony storage both before and after February 1, 1908.

Mr. DORR: I withdraw the offer at this time for the time being.

Q. The $272.82 that is marked with a red letter "O," what does that mean?

A. That means out and not included in the 10,900 cases.

Q. That is for storage on other salmon?

A. Yes sir.

Q. And prior to February 1st, I presume?

A. Yes sir.

Q. Were there separate bills rendered for a part of that $976.66 and other items afterwards rendered?

A. On October 31, 1908, there was a bill rendered for $976.66.

Q. Where was the other bill for those smaller items below you have included?

A. I haven't got them.

Mr. McCord: I object to the introduction of the exhibit as to those items because there is no proof here that that particular item, those particular items, have anything to do with the salmon in controversy.

Mr. Dorr: I withdraw the offer temporarily. (Short recess.)

Direct examination of Mr. L. O. Waldo by Mr. Dorr (resumed.)

Q. Mr. Waldo, I now hand you again plaintiff's exhibit 21 and ask you if you are able to segregate the warehouse charges upon this salmon in controversy from the total amount of the bill rendered that were shipped in that bill prior to the first day of February, 1908?

A. Yes sir.

Mr. McCord: On which item, the $976?

Mr. Dorr: Yes sir.

285 A. Yes sir.

Q. You may explain that, how you do it?

A. The three warehouse receipts that were issued were issued under various dates and the rate per ton per month is noted in the bill——

Q. In the bill you have?

A. In the bill of the Bellingham Warehouse Company.

Q. Is that attached there?

A. Yes sir.

Q. Just refer to that bill where you find the rate per month?

A. That is what I am doing. It shows the rate per month on each of these warehouse receipts and I have computed the number of months and find by that method that $118.24 of that $976.66 was for warehousing prior to February 1, 1908, and the balance was since that time.

Q. What was the amount of the balance since that time?

A. That would be $858.42.

Q. Now, with respect to the item of insurance can you tell from that bill what part it covered whether after or before February 1st?

A. I think a while ago I testified it was after February 1st, but I was mistaken in that if I did, it was before February 1, 1908.

Q. The insurance bill?

A. Yes sir.

Q. Have you got that right now, or just reversed?

A. I have corrected it and made it right now. I just got it reversed that was not the way I intended to say, the insurance noted in this bill is insurance after February 1, 1908.

Q. What is the amount of that insurance?

A. Three hundred and six dollars and twenty-two cents.

Mr. Dorr: We now re-offer this exhibit.

Cross-examination of Mr. L. O. Waldo by Mr. McCord:

Q. That item, is that insurance or merchandise that 4.85?
286 A. As far as I can tell it was insurance. I do not know what it was from inquiry.

Q. About this $301.37 insurance, how do you know that was for insurance accruing subsequent to February 1st, 1908?

A. There is a bill there, October 31st, 1908, covering it.

Q. Showing the number of months and rate?

A. Yes sir.

Mr. McCord: I make the same objection that I made a moment ago. It is irrelevant, incompetent and immaterial, not the best evidence and hearsay, indefinite and uncertain.

The Court: You have got it so you can take it up now and point on the bill what he claims is properly in this charge and what is out.

Mr. Dorr: We can point out on the exhibit what accrued since the First of February and what accrued before that time.

Q. I notice on that exhibit $104.42, and the bill is dated October 31, 1908, that would run back 11 months and take in some prior to February 1, 1908, would it not—if you will examine the bill (hands witness exhibit 21)—I notice in this statement there is one policy for $10,000.00, $104.42, for 11 months' insurance, that was 11 months' insurance prior to October 31, 1908?

A. I did not take it that way.

Q. Then it was not correct? The $301. was for insurance earned subsequent to February 1st, because it includes portions of insurance prior to February 1st, manifestly?

A. It would appear so in that case.

Q. And in the statement you do not find any other bills except those two small items?

A. No sir.

Q. That would lead you also to the conclusion that those small items were not for the insurance or it would be furnished on
287 the statement as insurance?

A. I should think that would be included by reason of the date.

Q. Merchandise does not include insurance?

A. Not necessarily.

Q. If you find a bill for merchandise you would not think it was for insurance, would you?

A. That item of merchandise is stated for insurance.

Q. As a matter of fact outside of that statement the bill would indicate those two items were not insurance?

A. No sir, it would indicate they were insurance items, it is clearly stated in one as being insurance.

Q. Isn't there another item, memorandum there from the Bellingham Warehouse Company on October 31, 1908 for 4250 cases of salmon left on hand overhauled, a charge for nails, that is the item is it not?

A. That may be the same item.

Q. On November 3, 3230 cases overhauled and labeled, nails charged, $4.85, which is that item is it not?
A. That item is marked insurance here.
Q. You say you made inquiry at the time, you must have known of this bill which I call your attention to—you must have had that?
A. I did not have it.
Q. You would think this bill that was rendered to you was correct?
A. I would not have any more reason for thinking that bill was correct than the other.

Mr. McCord: I object on the ground he has not properly segregated the insurance.

Mr. Dorr: Did you take 2/11ths of that item out?
A. Yes sir.

Mr. Dorr:

Q. That one item that ran 11 months is $101.42?

Mr. McCord: That would be about $18.00 wouldn't it, Mr.
288 Waldo?
A. It is $18.98.

Redirect examination of Mr. L. O. Waldo by Mr. Dorr:

Q. Deduct that from the amount of insurance that you have and what is left, what is the amount? Deduct that from the $301. bill, the insurance.
A. It is $282.39.
Q. After eliminating that two months and that other small item?
A. Yes sir.
Q. What is the amount you find left?
A. The amount is $282.39.
Q. Will you make that correction? (Witness makes correction on paper held in his hands.)
Q. Now please give me the net amount of insurance charges since the 1st of February, 1908, after deducting those amounts?
A. It is $287.24.
The Court: I do not think you included those two little items.
A. No.
Q. I want you to deduct those two small items.
The Court: Deduct $11.23.
Q. You want me to deduct $11.23 from the bill of $301?
Mr. McCord: Yes.
Q. The amount of insurance charge is on the bill?
A. The original amount is $301.37.
Q. How much did you deduct for that charge, 11 months' policy?
A. I deducted $18.98.
Q. That leaves what?
A. It leaves $282.39.
Q. Now, what are those other items that counsel directed your attention to?

A. Eleven dollars and twenty-three cents is right.

Q. Deduct $11.23 from $282.39.

289 A. That would leave $271.16.

Q. That would leave the net amount of insurance, deducting all those items that are in question?

A. Yes sir.

Mr. McCORD:

A. I believe you are not a bookkeeper you said?

A. Yes sir.

(Whereupon the witness was excused and left the stand.)

Mr. DORR: We now renew our offer.

Mr. McCORD: I object to it as irrelevant, incompetent and immaterial, not the best evidence. It is a mere compilation by one man who is a bookkeeper and one who is not, from books the authenticity and correctness of which has not been established.

Mr. DORR: My offer is a receipt from the Bellingham Warehouse Company.

Mr. McCORD: And on the further ground it is uncertain, mere guess work on the part of this witness as to the segregated amounts, that is as to what is properly chargeable to the defendants if the plaintiff is right in this contention, and some of that is not properly chargeable under any circumstances. I believe it is too indefinite and uncertain.

The COURT: The witness was requested to indicate those items that he claims belong and what he claims do not.

Mr. DORR: That is what he has done now.

The COURT: It may be admitted and exception noted.

Mr. DORR: In this connection we offer plaintiff's exhibit 20, being the return check for the payment of this bill.

Mr. McCORD: No objection to that check.

The COURT: It may be admitted.

(Whereupon court adjourned until the hour of 1.30 of the same day, at which time the court opened according to adjournment, all parties being present as heretofore, jury conceded present, trial proceeded.

290 Mr. L. P. BYRNE, being recalled, testified as follows:

Direct examination by Mr. DORR:

Q. Yesterday you were asked to figure the interest on the warehouse bill so called, for $1706, and some cents. I want now to ask you to segregate the amount and give the amount of interest on that bill for the amount of the items which Mr. Waldo has testified to as applying to the pink salmon in controversy, since the 1st day of February, 1908, if you can.

A. You want the amount of interest on those items?

Q. Yes, what that total amount is?

A. Twelve hundred and eighty-five dollars and fifty-seven cents.

Q. What was the interest on that amount from date it was due until yesterday?

A. Fifty-four dollars and nine cents.

Q. How much difference would that make in the total of the claim as figured by you, how much ought to be deducted from the deductions or on account of the interest that is eliminated?

A. Four hundred and thirty-nine dollars from the items there.

Q. It would make it that much less.

A. Less than the $1705.84 plus interest on that.

Q. And that would make your grand total how much, that is as corrected?

A. Including interest?

Q. Everything, the whole business.

Mr. McCORD: I object on the ground he is asking for a conclusion of the witness, which should be drawn by the jury. To put this witness on the stand and ask him how much this jury ought to find for the plaintiff is certainly improper.

Mr. DORR: I will withdraw that question.

Q. It makes a deduction of how many dollars from the figures made yesterday?

Mr. McCORD: I object to the question as an attempt to
291 invade the province of the jury and giving his conclusion.

The COURT: I understand he gave yesterday a summary of the items that they are contending for and now you want to withdraw some of those items?

Mr. DORR: Yes sir, I want to withdraw part of that warehouse bill.

The COURT: You will be permitted to do that.

Mr. McCORD: I object as being incompetent, irrelevant, immaterial and also asking for a conclusion of the witness, stating the result of the amount he finds due and the amount the jury should find for the plaintiff.

The COURT: I presume this question should be directed to how much was withdrawn and what for.

Q. You may answer that the way the Court indicates, what the amount is and what the interest is on those items, what it amounts to.

Mr. McCORD: I object as being incompetent, irrelevant, immaterial, asking for a conclusion of the witness, asking for his knowledge of the books and figures that he does not know personally, but which he has probably gathered from the books and records in this case.

Mr. DORR: This is for the defendants, we are attempting to cut down the amount now.

Mr. McCORD: You need not take care of the defendants.

The COURT: He may answer.

A. Four hundred and thirty-nine dollars.

Q. What were those items eliminated from this alleged warehouse bill?

A. October 31, 1908, $6.38; December 7, 1908, $18.98; December 7, $4.85; October 28, $118.24, October 28, $272.82, total $421.27; interest on the same since date of warehouse bill to May 2, 1910, $17.73.

Cross-examination of Mr. L. P. BYRNE by Mr. McCORD:

292 Q. Those items, you know nothing about the deductions yourself, do you?

A. No sir.

Q. You deducted them because you were told to deduct them?

A. Yes sir.

Q. How did you arrive at the computation of the item of $118., or did you make that computation yourself, or did Mr. Waldo make it?

A. I did not make it.

Q. Do you know how it is made?

A. No sir.

Q. You were figuring with Mr. Waldo during the recess today?

A. Not on that item.

Q. He stated you were assisting him on the stand a few minutes ago.

A. I was checking collection and interest.

Q. Do you know how it was arrived at?

A. No sir.

Q. The item of $974. is a part of that warehouse charge is it not?

A. There is an item here of $976.66.

Q. That item of $976.66, I will ask you to turn to that exhibit and tell me how you arrived at the $118.

A. I did not arrive at that.

Q. I will ask you if you know how to arrive at it, there is $976. for certain storage stated on the face of the bill, is there not?

A. Yes sir, $976.66.

Q. Part of that is for the storage that accrued prior to February 1, 1908, and part of that accrued subsequent to February 1, 1908, I will ask you to state what part of it accrued before that date and what part afterward-?

A. I can figure that out.

Q. I would like you to tell me how you are going to do it.

293 A. The rate per month is stated here——

Q. You figure that out and see if Mr. Waldo is correct; I have some doubt about the correctness of his figures; I would like you to check it out.

A. There are three separate warehouse receipts mentioned here. The rate per month I would imagine would be counted each month as a whole month. Warehouse receipt Number 8, December and January, 2 months, at $15.97 per month, $31.94; Warehouse receipt number 19——

The COURT: He does not want each calculation, I believe.

Mr. McCORD: I wanted you to tell me how to do it, I want to see whether it is correct or not.

A. One hundred and eighteen dollars and twenty-four cents.

Q. How did you do it?

A. I computed the rate per month for the number of months this statement states.

Q. You mean you figured up to February 1st?

A. Yes sir.

(Whereupon the witness was excused and left the stand.)

Mr. DOBB: I now offer in evidence the license of the plaintiff for the current year issued by the state of Washington, by the Secretary of State, and ask that the same be identified and admitted.

Mr. McCORD: No objection.

The COURT: It may be admitted. (Plaintiff's exhibit 35 marked.)

Mr. BRUCE: The plaintiff would ask to amend paragraph 4 of the complaint by substituting the word February 1st in lieu of January 1st, 1908.

Mr. McCORD: No objection.

The COURT: Let it be so amended.

Mr. BRUCE: I ask to amend paragraph 8 of the com-
294 plaint by substituting on the second line of the paragraph the figures 10,914 in lieu of 10,903.

Mr. McCORD: I object to that amendment as coming too late; the whole controversy has been devoted to 10,903 cases of salmon.

The COURT: I understand your witnesses testified it went out as samples.

Mr. DOBB: Yes sir, but it should have been sold and paid for if the defendant had accepted them he would have had to pay for the salmon the same as the rest of it. We are not charging for them.

Mr. McCORD: Then it is immaterial.

Mr. DOBB: They figure in these calculations.

The COURT: If they figure in and figure out I cannot see what is the difference.

Mr. DOBB: To make it check up, that is all.

The COURT: I guess you have explained it sufficiently now to show why it was done that way. I do not believe that the amendment should be made and it will be denied.

Mr. BRUCE: We want to make the same amendment in the 12th paragraph of the complaint as we did in the 4th, substituting the word February 1st instead of January 1st.

Mr. McCORD: I have no objection.

The COURT: That may be made, that is in the 4th line, the last line of the paragraph?

Mr. BRUCE: Yes sir, the last line.

(Whereupon the counsel for the plaintiff announced that the plaintiff rested, at which time the jury was withdrawn from the jury box for the purpose of defendant's motion following.)

Plaintiff rests.

295 *Defendants' Case.*

Mr. McCORD: On behalf of the defendant E. B. Deming, we now move the Court for non-suit and dismissal of this action for the reason that he is improperly joined as a defendant, for the reason the evidence fails to show any cause of action against him, fails to sustain any of the allegations of the complaint charging the said E. B. Deming with any liability on account of this transaction. There is not only no proof, but there has been a total failure of proof, and on the contrary not only no proof to show any liability on the part of E. B. Deming or to support any claim against him, but the evidence introduced by the plaintiff itself clearly and beyond a question demonstrates there is no liability on the part of E. B. Deming.

(Argument.)

Mr. McCORD: I desire to make a motion now on behalf of the Pacific American Fisheries for a nonsuit and dismissal of this action against that company on the ground there has been a total failure of proof to sustain the allegations of the complaint and impose any liability on the part of the Pacific American Fisheries and what is said with regard to E. B. Deming applies with equal force to what I now desire to say in connection with the Pacific American Fisheries.

(Argument.)

The COURT: I watched this evidence with reference to that, and I was a little surprised that the answer came in as a joint answer in view of the testimony that has been adduced here. I do not know of anything in these exhibits, and there is certainly nothing in the evidence that would make the Pacific American Fisheries a party to the contract sued on, and if you gentlemen have anything in mind to indicate that, I would be glad to hear it. I have had no access to the books except one or two little items since the motion was interposed.

(Argument.)

296 The COURT: I do not want to take away from the jury any matter in dispute about which honest men might differ. It has appeared this is a large transaction to be allowed to rest upon a mere oral contract. I am not satisfied about this matter as to whether or not the Pacific American Fisheries was a party to the contract as the case now appears; men might differ on that, and I think at this time it ought to go to the jury. If at the end of the hearing it appears different the counsel can make the necessary motion; and the same may be said as to Mr. E. B. Deming. It looks to me like that if I were in the jury box, in the jury's place, I would probably have to find that Mr. Deming was acting as an officer representing these corporations, one or both, but that is a matter men might differ about. It seems that they went into this contract, as large as it was, involving $150,000 odd dollars, as if it was a small ordinary affair. Evidently these men were in the habit of dealing in big things and did not realize the importance of the transaction at that time, that it was necessary to reduce it to writing, and be formal in the negotiations and transactions following the negotia-

tions. Men might differ about that. I am going to let the jury determine whether or not one, two or three of these parties mentioned made the agreement, if any was made. Where I think men might differ, and differ honestly, it is not a cause where the court should interpose his beliefs. One of the curses of the day is the modern tendency of the Court to get into the jury box, and especially is this true of one class of the judiciary. I do not believe it is true of the Supreme Court, but I believe it is true with the Federal Courts. I expect to avoid any error in that direction in my experience as a judge, and this matter may go to the jury on the issues framed and if at the end of the hearing the defendants' counsel desires to present the matter in proper form at that time, I can take it up in view of all the evidence. I think this is a case between business men and
297 gentlemen and we can probably get at the facts after both sides are heard; and I am going to hear both sides. We will proceed with the case on the issues framed against these defendants. Note an exception as to each of the defendants moving.

Mr. McCORD: I desire to make the same motion as to Deming-Gould Company on the same grounds.

The COURT: The same ruling, and note an exception.

(Whereupon the jury were recalled to the jury box, counsel for plaintiff and for defendant conceding jury present, the trial proceeded.

(Opening statement by counsel for defendants.)

Mr. E. B. DEMING, being called as a witness on behalf of the defendants, after being first duly sworn, testified as follows:

Direct examination by Mr. McCORD:

Q. What is your name?
A. E. B. Deming.
Q. Where do you reside?
A. Bellingham.
Q. What business are you engaged in?
A. Several lines.
Q. Are you connected with Deming Gould Company of Chicago, Illinois?
A. I am.
Q. That is one of the defendants in this action?
A. Yes sir.
—. What relation do you sustain to that company?
A. Vice president.
Q. How long have you occupied that position with Deming-Gould Company as vice president?
A. This last year.
Q. And what position did you hold with them in 1907?
A. Treasurer.
298 Q. What authority had you, if any, on behalf of that company to make contracts for the purchase of salmon and to sell salmon?
A. Full authority.

Q. Did you exercise that authority at various times?
A. Yes sir.
Q. Was it ratified by your company?
A. Always.
Q. And what previous authority did you have, were you authorized before you made that contract?
A. Yes sir. Ever since the company was organized.
Q. You are a stockholder in that company?
A. Yes sir.
Q. And what proportion of the stock did you hold in 1907?
A. One third of it.
Q. What relation do you sustain to the Pacific American Fisheries?
A. I am president of the Pacific American Fisheries at the present time.
Q. What position did you hold with that company in 1907?
A. Vice president.
Q. How long have you been connected with the Pacific American Fisheries?
A. Ever since it was organized.
Q. And the Bellingham Warehouse Company, what is that, Mr. Deming a corporation organized under what state?
A. It is organized under the laws of the state of Washington.
Q. Does the Pacific American Fisheries own any stock in that company?
A. I cannot answer that. I do not know whether they do or not.
Q. If so what proportion?
A. If they do it is a very few shares.
Q. The stock is held by individuals?
299 A. Yes sir, individually.
Q. Are you acquainted with the Carlisle Packing Company and its manager Mr. Frank Wright?
A. Yes sir, I am.
Q. How long have you known Mr. Frank Wright?
A. Ever since I have been on the Sound, since 1899.
Q. Did you have any business relation with him, Mr. Deeming, in the spring of 1907?
A. I did.
Q. And did you have any relation with him with regard to a can contract?
A. Yes sir.
Q. Did you make a can contract, the one that has been introduced in evidence here?
A. I did.
Q. On behalf of the Pacific American Fisheries?
A. Yes sir.
Q. Mr. Wright was representing what company?
A. The Carlisle Packing Company.
Q. That was cans for what year?
A. For 1907.
Q. Do you know the date of that can contract?

A. February 21.

Q. Twenty-third, was it not?

A. I am not sure whether it was the 21st or the 23d.

Q. Did you have any dealings with the Carlisle Packing Company with regard to the handling of the pack of the Carlisle Packing Company for the year 1907, the pack of 1907?

A. I did.

Q. For whom were you acting in your dealings with Mr. Wright?

A. For the Deming-Gould Company.

300 Q. Were you acting in an individual capacity in any respect?

A. No sir.

Q. Did you have any interest in the purported contract?

A. Only through my interest in the Deming-Gould Company.

Q. I mean individually?

A. No sir.

Q. Did the Pacific American Fisheries have anything to do with that contract?

A. No sir.

Q. What was the sole and only party in interest other than the Carlisle Packing Company?

A. Deming-Gould Company.

Q. I call your attention to the can contract of February 23rd, 1907, for the purpose of fixing the date. I will ask you to state when, with reference to that date, did you have your first interview with Frank Wright in regard to the disposition of his salmon pack for the year 1907.

A. Subsequent to that date.

Q. How long subsequently?

A. I should say a week or two probably.

Q. The can contract had been completed first?

A. Yes sir.

Q. Where was the first conversation held between you and Mr. Wright with regard to this salmon in controversy?

A. In my office.

Q. Where is your office?

A. In the office building of the Pacific American Fisheries at South Bellingham.

Q. In what portion of the building was your office located at that time?

A. In the rear of the building, the last office on the first floor, main floor.

301 Q. Where is the office of Mr. Drisko situated with reference to your office?

A. On the same floor, the next office.

Q. Is there any passageway between—hall, or what?

A. There is a hallway just outside of a railing, from his desk and there is also a little swing door that swings between his office and my office which would be inside the railing.

Q. When people wanting to see you, or that wanted to see you about that time on business, how did they reach this office?

A. They would have to go through this hall way past Mr. Drisko's office desk.

Q. Does Mr. Drisko's office open in the hall?

A. It was all open.

Q. No door?

A. No, just a swing door between his office and mine.

Q. Is there anything to obstruct the view from his office into this hall way?

A. No sir.

Q. How long had he been working for the Pacific American Fisheries at the time of this first interview with Mr. Wright?

A. Yes sir.

Q. How long had he been working for the Pacific American Fisheries at that time?

A. He had been working for the Pacific American Fisheries since 1905.

Q. I will ask you to state what occurred at the interview you had with Mr. Wright, the first interview, in regard to these salmon; I will ask you to state what you said to him and what he said to you, in regard to the purchase of the salmon?

A. I do not know that I can answer that just as to the first interview, because he was in there a number of times on cans and
202 salmon, too.

Q. I mean the first time you began the discussion of the making of this contract for the handling of his pack for 1907.

A. Mr. Wright came into my office about the time stated, and said that he wanted us to handle his pack of salmon, or in other words asked if he wanted to handle the pack.

Q. If who wanted to handle it?

A. Deming-Gould Company—to handle his pack of salmon for 1907 season. He said that what he wanted was to have the pack all sold by January 1st, 1908. I told him that we would not enter into any such an agreement as that, that we would make it February 1, 1908, and I gave him as my reasons—no, he stated that he wanted to have them sold at a fixed figure and I told him no, that we would sell his salmon the same as we sold them for others with this exception, that what we didn't sell by February 1, 1908, we, the Deming-Gould Company, would take them over at an agreed price, meaning the market price at that date. I told him it would not be just to the other packers we represented, the Pacific American Fisheries and the Bellingham Canning Company, whose goods we were selling, that we were sellers of salmon, and had to get the highest price at all times. And I gave him another reason that I had refused to make such a contract as that only a few days before, which was along in January, with the Alaska Fisherman's Packing Company at Astoria, who were packers of red Alaska salmon; that we needed red Alaska salmon a great deal more than we needed Puget Sound salmon, and I finally made a contract with them such as I suggested to him; the contract was arrived at and settled on that basis.

Q. Was that contract with the Astoria people reduced to writing?

A. Yes sir.

Q. Did you show him a copy of it?

303 A. I showed him a copy of the letter and the contract, and the letter which I had written.

Q. Did you read it to him?

A. Yes sir.

Q. Go ahead.

A. Along about in August sometime, I think it was, Mr. Wright had about 2,000 cases, if I remember rightly, of Sockeye halves, packed, and he came into the office and said he had been offered $1.00 a dozen for those sockeyes and that he believed it was a good price——

Mr. DORR: I object to that as not being responsive.

Q. State the conversation whatever it was in August in regard to this sockeye pack, while you are on that. I will ask what the conversation in August was with reference to the sockeye halves?

A. He said he had been offered $1.00 a dozen and he thought that was a very good price. I said "Mr. Wright, I do not think I would sell them at that price, I will agree to buy them from you at that figure, if you are going to sell them, but the probabilities are you will never have to take any less for them and there is a strong probability if the pack is a short pack as we anticipate, you will be able to get more money." Which was a fact, he got $1.05 a dozen for them. I sold them for him and after such a contract as he had suggested, I do not think I would have gone to work and stuck myself like that.

Mr. DORR: I move to strike that.

The COURT: The argumentative part at the last, I do not think is proper.

Q. Did you give Mr. Wright any reasons for it?

A. For what?

Q. Did you state to Mr. Wright what you now say about that you did not want to stick yourself?

304 A. I just gave the reasons.

Q. You stated that was the reason——

Mr. BRUCE: I understand that was stricken.

The COURT: Yes, that was stricken.

A. I stated it to Mr. Wright.

Q. If you stated to Mr. Wright what your reason was now state it?

A. The reason I gave Mr. Wright was I told him the price would not be any less in my opinion and in all probability it would be higher, but I would agree to buy his salmon at $1.00 a dozen if he insisted on selling, but I suggested that I would hold them, that we would get him $1.05.

Q. Did you state to him your reason for that; what you stated a moment ago?

A. No, that was the only reason I gave him, the other I added.

Q. Was Mr. Wright in your office at any other time in February, 1907, or in March, 1907, discussing the sale of the salmon?

A. Yes, he was in there 2 or 3 times.
Q. Was any one with him?
A. No, he was alone.
Q. Was Arthur Wadhams ever with him?
A. Not in my office at that time.
Q. Was Arthur Wadhams ever present at any time when you were discussing the agreement for the sale of Mr. Wright's pack for 1907?
A. He was not.
Q. Was he ever present when that matter was under discussion by you and Mr. Wright?
A. He was present just once.
Q. Where was that?
A. Outside the cannery office, which is out in the yard from the cannery.
Q. How far from your office?
305 A. A block I guess.
Q. And what was said then in regard to the salmon?
A. All that was said then Mr. Wright asked me for the contract, he said he wished I would write up that contract, and I told him I would just as soon as I had time. That was all that was said on the subject that I remember.
Q. Was there any other conversation in regard to this salmon that Mr. Wadhams was present at?
A. No sir.
Q. You know Arthur Wadhams personally, do you?
A. Yes sir.
Q. How long have you known him?
A. I suppose 7 or 8 years.
Q. You say that Mr. Wright came in first a week or two after the can contract was signed up. Had he discussed the sale of the salmon with you before the can contract was made or afterwards?
A. No, afterwards.
Q. Did you reach an agreement at the first interview?
A. No.
Q. Did you reach it at the second?
A. I do not remember whether it was the second or third.
Q. How long a period of time was there between the first discussion of it and the time you agreed?
A. I should say 4 or 5 days.
Q. Was there anything said at this interview as to what commissions you should have for the handling of the salmon?
A. I do not know. The commissions are always understood as the regular commission and discount.
Q. What was that commission?
A. Five per cent and 1½ trade discount.
Q. Was there anything said as to when the goods should
306 be delivered, about the orders, about the handling of them, about your taking any salmon before February 1, 1908?
A. Yes sir, I should give him orders pro-rata with the pack of the Pacific American Fisheries and pay for them on ten days' sight drafts against bill of lading.

Q. What do you mean by bill of lading?

A. The bill of lading is the negotiable piece of paper issued by the railroad company, that they give you as a shipping document, a shipping receipt is surrendered and you get a bill of lading for it and it becomes a negotiable document that can go through the bank.

Q. What is meant by a pro-rata distribution?

A. If the Pacific American Fisheries packed 100,000 cases or their pack was 100,000 cases, and we gave them orders for 20,000 cases and the Carlisle Packing Company's pack was 50,000 cases we would give them just half the number of cases, or we would give the Carlisle Packing Company orders for 10,000 cases.

Q. I would ask if during the year 1907 there was any conversation held with you and Mr. Wright, between you and Mr. Wright, with regard to the purchase of the sockeye salmon on a different basis from him, anything of that sort; what about the sale of any sockeye salmon to the Pacific American Fisheries?

A. That is to the Pacific American Fisheries?

Q. Yes.

A. No.

Q. I will ask you whether or not you did furnish him pro-rata orders with the Pacific American Fisheries?

A. We did.

Q. I will ask you if you paid for them within the ten days?

A. We did, that is there were ten days' sight drafts, it is different from ten days after the date of the bill of lading.

307 Q. Just explain that.

A. For instance, if I shipped goods to Deming-Gould Company at Chicago, and draw a ten days' sight draft that means it is payable ten days after presentation in Chicago.

Q. I will ask you whether the drafts in favor of Mr. Wright, the ten days' sight drafts were paid on presentation?

A. All of them.

Q. Were any of them ever protested?

A. No sir.

Q. You heard the testimony in regard to some delinquent interest unpaid on February 1, 1908?

A. Yes sir.

Q. I will ask you whether the drafts that you issued for the salmon that was shipped were paid according to the contract and within ten days after presentation?

A. Yes sir.

Q. You heard the testimony of Mr. Waldo in regard to these shipping receipts from Lummi Island to Bellingham?

A. Yes sir.

Q. Were those the bills of lading?

A. No sir.

Q. What is the difference then, between them?

A. You could not get a bill of lading until you surrendered to the railroad company the shipping receipts, those goods had to be delivered or shipped at a common point. The railroads make a

certain rate, for instance from Bellingham, Seattle and say Tacoma to Chicago, New York, at say 75 cents a hundred; they all carry the same rate, the rate from Bellingham to Chicago is the same as the rate from Seattle or Tacoma to Chicago. The Carlisle Packing Company would not be at a common point, therefore, these goods had to be taken to Bellingham or Seattle or some other com-
308 mon point, so these shipping receipts were receipts from the steamboat company for goods to be brought to Bellingham, a common point.

Q. I will ask you when this salmon was shipped over by steamer from Lummi Island by the Carlisle Packing Company to Bellingham where did they go?

A. To the Bellingham Warehouse Company's buildings.

Q. Were they delivered at that company's place?

A. Yes sir.

Q. What was done with them then?

A. Placed in storage and warehouse receipts accepted.

Q. To whom was the warehouse receipts delivered?

A. I do not know.

Q. Who were they made payable to?

A. The Carlisle Packing Company.

Q. I mean in whose favor was it drawn?

A. The Carlisle Packing Company.

Q. Do you know what was done with those warehouse receipts by Mr. Wright?

A. They were hypothecated with the First National Bank of Bellingham.

Q. I will ask you if the Pacific American Fisheries ever had this salmon delivered to it, that was shipped over here from time to time?

A. Not that I know of.

Q. Did you ever tell Mr. Wright to ship it to the Pacific American Fisheries?

A. No sir.

Q. How did it happen that that salmon was shipped to the Bellingham Warehouse Company's warehouse in Bellingham, do you know?

A. I do not know from my own knowledge.

Q. Did you have any conversation with Mr. Wright in regard to those shipments?

A. Not that I remember of.

309 Q. Did you have any with Mr. Purdy?

A. I did.

Q. And was it the arrangement with Mr. Purdy——

A. Mr. Purdy said he wanted those goods shipped over and put in a public warehouse and was going to have Mr. Wright to it.

Q. Mr. Purdy held the warehouse receipts from the warehouse on Lummi Island?

A. Yes sir, in their own building.

Q. Were they shipped over and the warehouse receipts turned over to Mr. Wright and then to Mr. Purdy?

A. Yes sir.

Q. You heard Mr. Wright's testimony did you not, in regard to the draft of about $32,000.00 for some that halves was it?
A. It was all sockeyes.
Q. State what that transaction was and what occurred?
A. Just before I started for the East——
Q. When did you start for the East?
A. About the 24th or 25th or something like that, I know I landed in St. Louis on the 29th, it must have been the 24th or 25th of October that I left here. So that just before I left for the East I told Mr. Wright that the half pound sockeyes were all sold, that he might as well ship them all. I wanted assorted cars—I spoke to Mr. Purdy and I said we will just pay for those. Mr. Wright and Mr. Purdy wanted the money, and I told Mr. Wright I wanted him to send them over and as soon as they came we would pay for them. I left instructions with Mr. Brosco that as soon as the salmon came, to pay for the goods and make a draft on Deming-Gould, over 7000 cases I think it was.
Q. Then the panic came on about that time, shortly after you left?
A. The banks closed down the day I landed in Minneapolis.
310 Q. What effect did the panic have on the sale of these sockeye salmon; you said you told Mr. Wright you had sold?
A. I do not know that it had any effect on the sale, it was sold. What goods we had already in transit and delivered people were refusing to take them so it was useless to let any more stuff go forward.
Q. What did you do when that arose?
A. I do not know how to answer that question.
Q. What did you do with this 7000 cases of salmon, did you hold it in Bellingham?
A. I do not know where it was, it had not come over when I left.
Q. Could you have got any money on it if it had been shipped?
A. No sir.
Q. Did you pay the draft that——
A. Mr. Brosco did not make the draft.
Q. Why not?
A. I wired him not to.
Q. Where from?
A. St. Louis.
Q. Have you that?
A. It is on the table.

(Defendant's exhibit G marked for identification.)

Q. I call your attention to defendants' identified exhibit G and ask if that is the telegram you sent?
A. Yes sir.

Mr. McCORD: I offer that in evidence.
Mr. DORR: No objection.
The COURT: It may be admitted.

Q. That was dated October 30th, St. Louis, Missouri?
A. Yes sir.

Q. Is that the telegram that Mr. Wright was testifying
311 about, and said it was sent from Eastern Washington?
A. I do not believe it could be because mine was sent from St. Louis.
Q. Did you send any from Eastern Washington?
A. No sir.
Q. Did you send any such telegram that Mr. Wright testified to from Eastern Washington?
A. No sir.
Q. Was that the only telegram as to that matter?
A. Yes sir, the only one.
Q. Did Mr. Brosco pay the draft? Did he pay it before he got that telegram, or did he pay it before you returned to the Coast?
A. Pay the Carlisle Packing Company?
Q. Yes.
A. No.
Q. As I understood it the reason you did not pay it was the people that bought the salmon would not take it?

Mr. DORR: I object as leading.
The COURT: Yes, it is leading.

Q. Now, how long were you in the East?
A. I was there 5 weeks, I guess I do not remember.
Q. You arrived back her then sometime in January, 1908?
A. Sometime in January, I think the latter part or middle of January, sometime in January.
Q. You were in St. Louis on October 30th, you went to Chicago from there, did you?
A. Yes sir.
Q. Then you came on back, you came back from Chicago?
A. Yes sir.
Q. Do you remember whether you arrived here before Christmas?
A. No, I do not.
312 Q. How long had you been here before the 5th of February, had you seen Mr. Wright between——
A. I do not know how long.
Q. You were here on the 5th of February, were you?
A. Yes, sir.
Q. I will ask you if you had any conversation with Mr. Wright at the First National Bank about that time?
A. I did.
Q. I wish you would state what that conversation was, what he said to you and what you said to him, all about it?
A. Before I went there Mr. Wright was in my office and was pressing for orders. I told him I could not give him any orders then and he said he wanted us to pay for his salmon and I told him all right if I could get the money I would pay him.
Q. For what salmon?
A. What salmon he had left, the tall pinks and the flat pinks and cohoes and halves and talls and flats, an assortment of salmon.
Q. So he said "Well, I think I can get it for you" and he went

over to see Mr. Purdy. Mr. Purdy was very anxious to shift the indebtedness from one shoe to the other, and he said Mr. Purdy would take care of it. I went over to the bank prepared to pay for the salmon and at that time I offered Mr. Wright 80 cents for his flat pinks and take his talls at the same price. That was the first time that I knew that Mr. Wright had any different understanding from what I did. He said not much, he would not sell his flat pinks at 80 cents a dozen, that he had a contract with me for 90 cents and he would hold me at that, and I said I would not take them at 90 cents and I said "you can keep the flats and I will take the talls, I do not care what you do" and he would not do either, and we had quite a heated argument as he stated, and Mr. Purdy went out and closed the door, as I suppose it got a little too noisy for him,
313 and he said what he would not do and I said what I would not do and Mr. Wright went out of the office in a rage and Mr. Purdy came up and I told him——

Mr. DORR: I object to that.

The COURT: Yes, if Mr. Wright was gone you cannot state what was said to Mr. Purdy.

A. That was the substance of the conversation.

Q. What have you to say as to whether the price you offered for this salmon, the tall pinks and flat pinks, at that time, was the market price?

Mr. DORR: I object to that as leading.

Q. State what the market price was?

A. I considered it 80 cents a dozen that was why I offered it I found afterwards that it was too high, from subsequent event

Q. When you made this offer at 80 cents a dozen for the pink flats I will ask if there were any conditions attached to it?

A. None whatever.

Q. Was any agreement mentioned between you and Mr. Wright, or was it stated at that time when you made the offer of 80 cents a dozen that you would give him that if he would release you from any liability on the contract? Was there anything of that sort said?

A. Not a thing.

Q. How did you happen to get possession, or how did you take the tall pinks, you say he refused it when he went out of the office?

A. I will have to go back at the start of it.

Q. State why you took the tall pinks?

A. After Mr. Wright went out Mr. Purdy came to me and said he had settled it.

Mr. DORR: I object to this conversation after Mr. Wright left.

A. Mr. Purdy phoned me next day about it.

314 Mr. DORR: I move to strike *was* was said to Mr. Purdy.

Mr. MCCORD: No objection.

The COURT: Yes.

Q. You did take the pink talls at the price you offered Mr. Wright?

A. Yes, sir.

Q. And I will ask you if you paid the 80 cents a dozen for them?

A. Yes, sir.

Q. To whom did you pay it?

A. To the first National Bank.

Q. For whom?

A. The Carlisle Packing Company, Deming-Gould paid the money on account of the Carlisle Packing Company.

Q. And Mr. Purdy held the warehouse receipts, did he?

A. Yes, sir.

Q. Did you take them up?

A. Yes, sir.

Q. Did Mr. Wright make any protest about that?

A. No.

Mr. DOBB: I object to that, Mr. Wright was not there.

Q. Did Mr. Wright make any protest to you about it?

A. No.

Q. And you had your dealings in the purchase of the salmon at 80 cents a dozen, the tall pinks, you had your communication with Mr. Purdy who claimed to be representing Mr. Wright?

A. Yes, sir.

Mr. BRUCE: That is only another form of getting in his conversation.

Q. Who paid this money into the First National Bank?

A. Deming-Gould Company.

Q. Do you remember the exact amount, or about the amount?

A. It was $51,700 and some odd dollars.

315 Q. What did that cover?

A. That covered pink talls, and I think some sockeyes, the memorandum shows, and half pound echoes, in other words what he had left except the one-pound flat pinks.

Q. Did you have any further conversation with Mr. Wright as to this salmon, afterwards?

A. No. I did not see him, I had no conversation with him.

Q. What have you to say in regard to the opening price of salmon, what is meant by that term, what do you understand it to mean?

A. I know what is meant by our opening prices.

Q. What does it mean?

A. The first price we put out and endeavor to get, to the trade, when we think we know about what the pack is going to be and size up the market we put out the price to see if they will take it, if they do not take it we will sell it for less.

Q. Is that the custom of other brokers, or do you know?

A. Yes, sir, I know. I know pretty well about what other brokers do.

Q. What is their custom with regard to the business generally?

A. It varies, but I think they all do about as we do, except one concern.

Q. What concern is that?

A. J. K. Armsby Company for the Alaska Packers.

Q. What is the difference between their method and others?

A. The Alaska Packers Association as a rule name a price and stick to it through the season, that is not an invariable rule, however.

Q. They varied it in 1903?

A. I think in 1903 they made quite a change, counsel there knows.

Q. Was the cut on sockeyes?

A. Red Alaska salmon.

316 Q. Then as I understand it the opening price is the price you put out as a sort of feeler?

A. Yes, sir, if the trade takes it it is all right, if not, we put out prices that do sell it.

Q. What price did you put out in 1907 for pink flats?

A. Ninety cents.

Q. Did they sell?

A. A few bit, not many.

Q. Then what did you have to do?

A. We reduced the price.

Q. Now, take the year 1907 with regard to the salmon pack of 1907 I will ask you whether there was any fixing of the opening prices made by Deming-Gould and the Alaska Packers' Association?

A. No, sir.

Q. And in other years has there been any combination between Deming-Gould & Company and the Alaska Packers' Association for the fixing of prices, opening prices?

A. No, sir.

Q. Was there any agreement or combination to that effect?

A. No, sir.

Q. Mr. Wadhams was mistaken in his deposition when he says the prices were usually fixed by Deming-Gould Company and the Alaska Packers' Association?

A. He did not know what he was talking about is all.

Q. That is not true?

A. It is not true.

Q. You heard Mr. Wright's statement here with regard to your failure to furnish him tall cans when he demanded them?

A. I did.

Q. What have you to say in regard to that statement of his?

A. The contract speaks for that pretty well, we sold him

317 120,000 tall cans and gave him the option of 120,000 more, and we delivered him 730,000.

Q. Did he demand tall cans?

A. Yes, everybody did, everybody wanted more tall cans.

Q. What was the condition of the hump back pack that year?

A. It was abnormally large, it was something unknown, the run was far beyond our expectations and way beyond the preparations made by any one.

Q. Did you furnish him his pro-rate share of the cans?

A. Yes, sir.

Q. When was the hump back run, the pink salmon run, when was that run in 1907, when did it begin and end?

A. It began along in August and ran clear into September.

Q. At the time the first prices were announced by you, or Deming-Gould Company, was the run over, Mr. Deming, or was it after or before?

A. I do not think the pack had been finished, I do not remember the exact dates that the prices were put out, but I think the run was still on.

Q. Was there any disposition on your part, on the part of the Pacific American Fisheries to deprive Mr. Wright of his share of the tall cans for the pack of 1907?

Mr. DOBB: I object as incompetent.

The COURT: He may answer.

A. None whatever.

Q. I will ask if you or the Pacific American Fisheries forced flat cans on him for the purpose of packing pinks for the season 1907?

A. No, he did not have to take them unless he wanted them, we did not force anything on him.

Q. And you delivered how many cans, tall cans to him?

A. Seven hundred and thirty odd thousand, I think the records show.

318 A. I will call your attention to that portion of Mr. Wright's testimony where he stated that you said to him there would be no charges for storage or insurance, what have you to say about that for the time the goods were in the warehouse over there?

A. I never made any such a statement.

Q. Did you ever have any such a conversation as that at all?

A. No, sir.

Q. When the warehouse receipts were issued to him or his company, was any protest made against the charges for insurance and storage?

A. No, sir, none.

Q. I will ask you how it happened that the insurance was written by the warehouse company, what occasioned that, did you force Mr. Wright to surrender his policy?

A. No, we did not force him, we made the request of him for two reasons, one was that our insurance was handled by one concern; it is what we call the Jumbo risk, and in order to get our full amount of insurance we gave it to one concern, and they were to get all the re-insuring, and we did not want that interfered with. Another reason was that a part of these goods were in what we call our No. 2 Warehouse, which is just a frame warehouse and the insurance rate on that was $2 a hundred, and in the brick warehouse just the other side of the Great Northern track the insurance rate was $1.10 a hundred and we had agreed with Mr. Wright to take the insurance at $1.10 a hundred, consequently we wanted to have it embodied right in the warehouse receipt and we wanted to do all of our insuring.

Q. Was that what you were paying for your insurance, $1.10 and $2?

A. Yes, sir. $1.10 in the brick warehouse and $2. in the other.

Q. How did the rate of $1.10 compare with what Mr. Wright was paying on Lummi Island, do you know?

A. I do not know what rate he had at Lummi Island, but
319 I should judge i twould be about $1.50.

Mr. DORR: I object to that, your Honor.

The COURT: Yes, your judgment on that would not be proper.

Q. Do you know how much money during the fall of 1907 Mr. Wright owed to the First National Bank?

A. No. I do not.

Q. You do not know from anything that Mr. Wright told you as to the amount of this indebtedness?

A. No, sir, I know nothing about it.

Q. What portion, if any, of the pack of this salmon of Mr. Wright's was delivered to you prior to February 1st or 5th, 1908? Delivered to Deming & Gould?

A. I cannot answer that without the figures.

Q. I will ask you if any salmon was delivered to you any other way than by turning over the bill of lading by the railroad company?

Mr. DORR: I object to that as incompetent, wholly so. That is a leading question and absolutely incompetent. He should ask what was done and let the jury determine whether that is a delivery or not.

The COURT: I presume at this state of the examination it would be proper to ask the witness what was said and done.

Q. I will ask you this queston, did you receive, or I mean, did Deming-Gould Company receive, or did the Pacific American Fisheries receive, or you individually, any salmon from Mr. Wright prior to February 1, 1908, of the pack of 1907?

A. I do not know just what your question is—whether we received it?

A. I mean whether it was brought over and you took it as a delivery. You took some and paid for it, but I want to know whether it was delivered to the Pacific American Fisheries, Deming-Gould Company or to you, or the Bellingham Warehouse Com-
320 pany, or who got the salmon that came over from Lummi Island?

A. I cannot answer such a question as that. It was probably sent to the Bellingham Warehouse Company's warehouse and shipped out, I cannot answer that.

Q. You say a large quantity of salmon you paid for on February 5th, you had got the salmon?

A. What I paid for?

Q. Other than this salmon in controversy here now, the 10,903 cases, I will ask——

A. It was delivered to the Bellingham Warehouse Company.

Q. Did you receive it?

A. Personally, no.

Q. Did Deming-Gould Company receive it there?

A. No, the warehouseman for the Bellingham Warehouse Company received it.

Q. Did Deming-Gould Company receive it, any part of it?

A. No.

Q. When you took up the warehouse receipts which you say you did from Mr. Purdy's bank, by paying the $32,000, what did you do with the warehouse receipts?

A. I took them over to the office, I presume.

Q. Did they surrender the warehouse receipts and you take the salmon?

A. Yes, sir, the goods were left where they were and we subsequently disposed of them. The papers simply changed hands, the warehouse receipts.

Q. And when the goods were sold by Deming-Gould Company——

A. The warehouse receipts were surrendered to the Warehouse Company.

Q. Did Deming-Gould hold any of these warehouse receipts prior to February 5th when you paid them off and took them—any of the salmon covered by this $52,000.00?

321 A. No.

Q. Did the Pacific American Fisheries have any of it?

A. Not that I know of.

Q. Did you have any of it, personally?

A. No.

Q. You heard Mr. Wright's statement that he called at your office the first time and that you made the proposition to him to take his salmon and accept the unsold portion on February 1st or January 1st, at the opening price and that he said nothing at all, that you made the proposition, you were trying to buy the salmon, Deming-Gould Company, what is the fact as to that?

A. The contrary. He came to me to see if we wanted to handle his salmon. I never mentioned it to him until he broached the subject.

Q. You heard him state that he came back, you had made the proposition——

Mr. DORR: I object as leading.

Mr. MCCORD: It has to be leading, I am directing his attention to the matters.

The COURT: Go ahead.

Q. On the second conversation you had when he came back and accepted the proposition made by you on the first interview?

A. He did not.

Q. State what was said and done, what did occur on the second interview?

A. I do not know whether it was the second or third interview, I do not remember the interview.

Q. How many times was he there all together?

A. He was there 2 or 3 times, but I do not know whether it was

the second or third time on this proposition. I should say he was there twice, and he might have been there oftener than that.

322 Q. In any conversation did you make any such a proposition that you would handle his salmon for 1907 and then take over the unsold portion of it on January or February 1, 1908, at the opening prices?

A. I did not.

Q. Was anything said about the opening prices at these conversations?

A. No, not that I know of.

Q. And I believe you stated that he said that he wanted you to take it at the opening price, but you told him you could not do that?

Mr. DORR: He just said nothing was said about that.

Q. A few moments ago——

A. I know what you are driving at. He said he wanted me to take the salmon and have it all paid for by the first of January at the—I do not know whether he said the opening price or the market price—and I told him I would not agree to buy his salmon and take it at that time, that I would give him orders pro-rata with the Pacific American Fisheries at the prices the Pacific American Fisheries salmon was sold at, not at the opening prices, but at the prices it sold at, the best I could get, and the unsold portion on February 1st, we would take over at the market price.

Mr. DORR: Is that what you said then?

A. Yes sir.

Q. Meaning what the market price was at what time?

A. On February 1st.

Q. I will ask you if the portion of the salmon of the Carlisle Packing Company that you did sell, I will ask you if you did sell it at the prices you sold for the Pacific American Fisheries at?

A. Yes sir.

Q. In the month of February or from February 5, 1908 on to two or three months afterwards do you know at what prices pink flats were held on the Sound, and what was the market price asked for on the market, and what was the market price determined

323 by, brokers of salmon were holding it at?

Mr. DORR: I object being incompetent.

Q. I will put it another way: I will ask you to state if you know the prices among salmon brokers, at which pink flat salmon was held for 2 or 3 months immediately following the 5th of February, 1908?

Mr. DORR: I object to that as incompetent for any purpose.

The COURT: You are trying to prove the market price of this commodity several months after the opening price through and what the *the* brokers are alleged to have fixed as the price at that time That is not a test of market price at all.

Q. I will change the question: I will ask you to state if you know at what price or prices for a month or two immediately following February 5, 1908, flat pink salmon was quoted at and held at and announced at as the market price by the principal salmon brokers in the state of Washington, the city of Chicago, New York, and elsewhere?

Mr. DORR: To which plaintiff objects for the reason the question asks for incompetent evidence in this: It does not contain the elements necessary to establish a market value of the product which is in controversy in this action. (Argument.)

The COURT: The objection is sustained. (Exception allowed defendants.)

Q. What portion of the salmon of Mr. Wright did you sell at 90 cents a dozen, the opening price?

A. I cannot answer it, I do not know.

Q. What quantity did you sell of the Pacific American Fisheries salmon at 90 cents a dozen of this grade?

A. I cannot answer that, I do not remember.

Q. Any large quantity?

A. No a small quantity.

324 Q. Now between the 26th of August, 1907 and the 1st of February, 1908, did you sell any fish for the Pacific American Fisheries and of this variety and grade, any pink flats?

A. Yes sir.

Q. Did you sell any at less than 90 cents a dozen?

A. Yes sir.

Q. At what figure?

Mr. DORR: I object as immaterial.

The COURT: I will let him answer.

Q. At what price did you sell any of the flat pink salmon for the Pacific American Fisheries between August when the prices were announced and February 5th?

A. I cannot answer that definitely.

Q. Was it as much as 90 cents a dozen?

Mr. DORR: I object as leading.

Q. What was the market price of pink flat salmon between August and February 5th, 1908?

Mr. DORR: I object as immaterial, that is before this contract matured.

The COURT: He may answer.

A. Ninety cents.

Q. That was the market price?

A. Yes sir between that period.

Q. What do you mean by the market price, the price it was held at or the price that was being sold at?

A. The price held and quoted at.

Q. Now, the prices at which it was being sold, what were those prices?

A. I do not remember. It sold for less than 85 and 80 cents.

Q. And what were other salmon brokers doing between August, 1907 and February 1, 1908 with their salmon of this variety?

325 A. The same thing.

Mr. DORR: I object as immaterial.

The COURT: I think it is immaterial what other brokers were doing.

Mr. MCCORD: I want to know what they were selling at.

The COURT: You can show the market price, but I do not think you are going at it in the proper way. I will let you show the market price any time between the delivery period and the time involved.

Mr. DORR: We claim that up to the 5th of February we had no control over this salmon at all.

The COURT: I think the price of the commodity might be material between the making of the contract and the time it was either carried out or breached.

Q. If the market price was as you say 90 cents a dozen you mean by that the price at which it was quoted by the brokers and it was sold for less than that. I will ask you at what price it was being sold for on the market between August 26, 1907 and February 1, 1908, what it was being sold at on the market?

Mr. DORR: I object to the question as leading.

The COURT: I will let him answer that, if he knows.

A. Eighty and eighty-five cents.

Q. Now I will ask you to state if you know what the market price of salmon was for a month or two, 2 or 3 months immediately following the 5th of February, 1908, in this country?

A. There was not much of a market of any kind that I know of; I know what I thought was the market, what I claimed was the market.

Q. What did you claim was the market?

A. Eighty cents a dozen.

Mr. DORR: I object as incompetent.

The COURT: His judgment on it would be proper.

Q. What was it, Mr. Deming?

326 A. Eighty cents a dozen.

Q. What was it say from the first of May on until say the first of September, 1908?

A. All the way from 75 cents to 67½ cents.

Q. And from that time on until August of the following year, what was the market price?

A. About the same.

Q. Were you the brokers for Campbell's pack, Mr. Deming?

A. Not that year.

Mr. MCCORD: I think you can cross-examine for the present.

Cross-examination of Mr. E. B. DEMING by Mr. DORR:

Q. How long have you been engaged in the salmon business?
A. What branch of it?
Q. Any branch?
A. About 26 years.
Q. In what particular branch have you spent the most of the time during that 26 years, in the selling or manufacturing?
A. In the selling.
Q. Where?
A. Chicago and St. Louis.
Q. How long have the Deming-Gould Company been organized?
A. The Deming-Gould Company as a corporation was incorporated, I believe, in 1893.
Q. Prior to that time was it a partnership?
A. Yes sir, Deming & Gould.
Q. Composed of the same people?
A. Yes sir, except Frank Deming.
Q. You were originally a member of the same firm?
A. Yes sir.
Q. And associated with you was Mr. Gould?
A. Yes sir.
327 Q. And later on your brother came in?
A. Yes sir.
Q. And you three now compose Deming-Gould Company?
A. Only the two of us now. Mr. Gould is out.
Q. So you have been principally interested in the selling of salmon for 26 years?
A. Yes sir.
Q. How long have you been on Puget Sound?
A. Since 1900.
Q. And since you have been here, if I understand you correctly, you have been engaged in a good many different lines of the business?
A. Yes sir.
Q. Including the packing of salmon?
A. Yes sir.
Q. As manager of the Pacific American Fisheries?
A. Not all of the time.
Q. Well, lately?
A. Yes sir.
Q. Before and since 1907 that has been the case?
A. I was with the Pacific American Fisheries from 1900 to the end of 1901.
Q. And then there was a cessation of your connection?
A. Then the Pacific American Fisheries sold out and I remained here simply handling salmon during that period until 1905, as the Deming-Gould Company.
Q. From that time until the present you have been, and now are, its manager?
A. Yes sir.

Q. And you are also president of the company at the present time?
A. Yes sir.
Q. You have testified that the opening price for 1907 of
328 the pink flat salmon was 90 cents a dozen?
A. That was our opening price.
Q. Was that not the general opening price?
A. I do not know.
Q. Do you know anything to the contrary?
A. No.
Q. Were not your prices uniform with others that were put out at that time?
A. I do not think so.
Q. With respect to that kind of fish?
A. No sir because they sold for less.
Q. You do not know anything about other opening prices.
A. No sir.
Q. Do you know anything about the opening price for other grades of salmon that year?
A. Yes sir.
Q. What was the opening price for pink talls?
A. Eighty cents.
Q. Medium red talls?
A. $1, I believe, I am not sure.
Q. Medium red flats?
A. One dollar and ten cents.
Q. Was it not $1.15?
A. May be; I know my recollection is that our price was $1.10; I am pretty sure it was $1.10.
Q. You are not sure whether it was $1.10 or $1.15 are you?
A. I said I was pretty sure it was $1.10, I would not swear it was.
Q. Sockeye talls?
A. One dollar and sixty-five cents.
Q. Sockeye flats?
A. One eighty.
329 Q. Sockeye half flats?
A. One dollar eighty-five.
Q. Were not sockeye half flats $1.10?
A. No sir, I do not think so.
Q. Are you sure?
A. No, I am not sure.
Q. How much pink salmon did the Pacific American Fisheries pack that year, one pound flat pinks?

Mr. McCord: I object as immaterial and not proper cross examination.
The Court: Let him answer.

A. My recollection is 30,000 cases.
Q. Did you sell any of that fish at 90 cents a dozen, the opening price?
A. Yes.

Q. You said a few bit, what did you mean by that?

A. I meant a few cases weere sold of the flat pinks. There were a few foolish enough to take it at that price at that time.

Q. There were a few foolish enough?

A. Yes sir.

Q. Do you know how many were so sold in the aggregate?

A. No sir.

Q. Was it 10,000 cases?

A. I do not know.

Q. Do you know anything about it?

A. Not without referring to the records; I do not pretend to burden my mind with such things as that.

Q. You cannot tell anything about it?

A. No sir.

Q. Did you sell a single case of the pink flats of the plaintiff that year?

A. I do not know.

330 Q. Do you not know that you did not?

A. I do not know whether we did or not.

Q. Then if Mr. Wright claimed that not a case was sold you do not dispute that?

A. I do not now, because I do not know.

Q. If you agreed to pro-rata the selling of the Carlisle Packing Company's pack with the Pacific American Fisheries, and you sold the Pacific American Fisheries salmon and did not sell the Carlisle Packing Company's salmon, you did not pro-rata them, did you?

A. I did not agree to pro-rata on every kind or size, I said if they packed 50,000 and we packed 100,000 we would give them orders pro-rata, I did not say they would be half pink flats or sockeyes; it is the number of cases.

Q. If their pack was 50,000 and yours 100,000 under your theory of the pro-rata arrangement you would have the right to pick out the most saleable of their goods and in that way pro-rata them?

A. We aim to be fair and we picked them out the best way we could, and gave him his pro-rata.

Q. You could not have given him his pro-rata on that flat pink salmon if you did not sell any?

A. But we might have given him as much as that of something else that he was anxious to sell.

Q. Did you sell any of their sockeyes?

A. Yes sir.

Q. Did you sell any of it before the 5th of February?

A. I presume we did.

Q. If you did, did you pay for it?

A. If we did we paid for it.

Q. Didn't you do this; put their sockeye salmon in the warehouse and sell the Pacific American Fisheries' that year?

A. No. We gave them their pro-rata of the business.

331 Q. You gave them their pro-rata of the sockeyes?

A. We gave them their pro-rata of the salmon; I do not know whether it was *it was* pinks or sockeyes.

Q. You have testified there was a large pack of pink salmon that year?

A. Yes sir.

Q. And a small pack of sockeyes?

A. Yes sir.

Q. Before you went away to St. Louis you told Mr. Wright that all of the half flat sockeyes were sold?

A. Yes sir.

Q. And therefore he could ship them over and you would pay him for them?

A. Yes sir.

Q. Now had they been sold?

A. Yes, they had been sold.

Q. And this was in October?

A. Yes sir.

Q. Now, if they had been sold and you did not pay for them until February 5th, you didn't pay for them within ten days after they had been sold?

A. That wasn't the understanding—no, I did not pay for them ten days after they were sold, I paid ten days after they were shipped.

Q. When were they shipped?

A. Those were not shipped for some time, I do not remember just when.

Q. Had they been shipped on February 5th?

A. I cannot answer that.

Q. Were not those same salmon unsold when this $51,000.00 and some odd dollars was paid?

A. I guess they were, I do not know whether the entire amount was or not.

332 Q. And that was merely a matter of transferring the warehouse receipts?

A. Yes sir. We had a lot of stuff that was not shipped but was sold.

Q. Do you know whether these payments were made according to the time that the Carlisle's salmon was shipped out after the panic came?

A. I do not understand the question.

Q. Do you know personally when the Carlisle Packing Company's salmon was shipped out, that you did sell, that was sold?

A. I cannot remember those things.

Q. You do not know personally whether they were paid promptly or not?

A. Everything that was shipped was paid promptly.

Q. Do you know personally?

A. Yes sir.

Q. How do you know?

A. Because I paid it.

Q. You mean to say you sold some of the salmon and did not ship it?

A. Yes.

Q. You sold it and advised Mr Wright it had been sold and then did not ship it?

A. Yes sir.

Q. When you came to settle on February 5th, tell the jury what that $51,700 and some odd dollars covered?

A. Everything he had except the pink flats.

Q. What was that?

A. I do not carry those things in my head; virtually all the salmon some half pound cohoes and I think some Chums?

Q. What price did you pay for each and every grade?

A. I do not remember the prices.

333 Q. Was it at the opening prices?

A. I do not remember.

Q. Do you know anything to the contrary, that you settled on any other basis than at the opening prices?

A. I think it was probably at the opening prices.

Q. Now, going back to the time that you first had the interview with Mr. Wright regarding the contract for that year, I want to get a little more detailed information on that subject, and I wish to ask you who opened the conversation?

A. Mr. Wright.

Q. What did he say first? Give his exact words if you can, and if you cannot give the substance of it?

A. He wanted to know if we wanted to handle his pack of salmon that year.

A. He wanted to know if we wanted to handle his pack of salmon this year?"

A. Yes sir.

Q. What else did he say or what did you say?

A. I told him we would be very glad to.

Q. What else was said by either of you; go ahead and relate the conversation?

A. He asked if we would like to have his pack of salmon and I told him yes, and he stated then that he would like to make arrangements with us to handle his pack and have it all sold and cleaned up by the first of January, and I told him we couldn't do that.

Q. What did you understand he meant by having it all sold by the first of January?

A. He wanted his money for it.

Q. He wanted you to guarantee to take it or sell it?

A. Yes sir.

334 Q. You told him you could not do that?

A. That I could not do it.

Q. How did the first of February come in the case?

A. I told him I would handle his pack of salmon and give him orders pro-rata with the Pacific American Fisheries at the same prices as theirs and sell the goods at whatever prices they were sold at the Pacific American goods, and such goods that were not sold by the first day of February, not the first day of January, we would take over at an agreed price, meaning the market price.

Q. Did you say to him "meaning the market price?"

A. I did.
Q. You said those words?
A. Yes sir.
Q. You said "we will take them over at an agreed price, meaning the market price?"
A. I did.
Q. What did he say?
A. He said very well, he said all right, we could handle his pack.
Q. That was the first interview?
A. I could not say that it was the first interview.
Q. That it what I am asking about, the first beginning of this thing.
A. I do not know whether it was the first or second. The first interview he did not make any answer at all, he said he would let me know.
Q. What did he say he would do in the meantime?
A. He said he would let me know.
Q. You knew Kelley-Clarke Company had been financing the Carlisle Packing Company previously?
A. No. I did not know anything about it.
Q. And selling their goods?
335 A. I knew they were selling the goods, but I did not know they were financing them.
Q. Did you have any conversation with Mr. Wright about financeing him?
A. No sir.
Q. Did he ask you to furnish any money to put up the pack?
A. Not that I know of.
Q. Did you have any talk with him relative to where he would get the money to put up his pack?
A. No.
Q. Did you not know he was negotiating with the First National Bank here?
A. I did not at that time.
Q. When did you first find that out?
A. I do not know. Sometime after that Mr. Purdy told me he was financing them.
Q. And your version of it was that you would sell the pack for the Carlisle Packing Company during the season and if any part of it was unsold on the first of February then you would take it over at the market price, and if you could agree on the market price, if not Mr. Wright could keep it, and you would continue to sell it thereafter?
A. Yes sir.
Q. Is that correct, that was what you understood?
A. Yes sir.
Q. That involved an agreement then between you and Mr. Wright as to what the price would be on the first of February, and if you could not agree there would be no sale, is that right?
A. Yes sir.
Q. Then according to your version of it, you were under no obli-

gation to take the salmon at all except at some price you would agree to on the first of February?

336 A. The market price.

Q. I understand you to say if Mr. Wright and you could nat agree on the price he could keep the salmon?

A. Of course, if he held above the market price, I agreed to take it at the market price.

Q. Was anything said as to how that market price was to be fixed?

A. No sir.

Q. I understood you to say that had to be agreed to by you and Mr. Wright?

A. Usually you have to have two people agree to a bargain.

Q. Under this contract you were not binding yourself to do anything positively?

A. I think I was when I agreed to take it at the market price.

Q. That was on condition that you yourself had to be satisfied as to that market price?

A. No, you could tell what the market price was.

Q. That was to be left to arbitration or how was it to be fixed?

A. No.

Q. How was it to be fixed?

A. I suppose if it varied from 67½ cents to 90 cents it would be easy to determine the market price by calling anybody.

Q. It does not seem to be easy to determine it in this law suit.

A. Mr. Wright never made any effort to determine it.

Q. It does not seem to be easy to determine it right here now.

A. The market price is what you can sell your goods for, is it not? He could have sold them for 80 cents.

Q. To you?

A. Yes, that would establish the market, and he could not have sold them for any more than that to anybody else.

Q. He could not have sold them to anybody else for that?

A. Then he ought to have been satisfied with that price.

337 Q. But, as a matter of fact, you could not go out and sell those goods at any price at that time?

A. I do not know whether I could or not.

Q. You know what the condition of the buying market was?

A. Yes sir, I was a buyer, I ought to know.

Q. You were not a buyer for consumption?

Q. It makes no difference whether you are buying to eat or to sell.

Q. You were not in the market for salmon at 80 cents a dozen?

A. I was willing to buy it for 80 cents.

Q. Do you know what the condition of the trade was, people that bought for their own use and trade?

A. Yes sir.

Q. Was there a lively demand for it?

A. No sir.

Q. Was there any kind of a demand?

A. No sir. That is when we buy when the market is dull and we sell when the other fellow wants them.

Q. And you offered him 80 cents a dozen when he was claiming 90 cents?

A. No, he was claiming 90 cents under the contract.

Q. You were disputing that?

A. Yes sir, I was disputing his version of the contract.

Q. You offered them 80 cents a dozen for the flat pinks?

A. Yes sir.

Q. And it was your idea that that offer was to settle the dispute and save any further trouble over it, wasn't it?

A. There was no sort of a stipulation.

Q. That was your idea about it?

A. My idea was to carry out my contract according to my version of it, to be fair with him.

Q. In giving him 80 cents a dozen at that time you were
338 really giving more than you considered the goods were worth on the open market?

A. Yes sir, because there was no demand for salmon. I thought it was more than fair.

Q. When was the arrangement made with Mr. Wright to charge him $1.10 insurance on this salmon?

A. When he got ready to send his salmon over.

Q. What time was that?

A. He came over and asked what the rate was.

Q. What time was that?

A. I do not remember, it was in the fall sometime.

Q. Did that apply to this salmon, or to all the salmon?

A. It applied to anything he put in the Bellingham Warehouse Company's warehouse.

Q. Did he ship anything over to the Bellingham Warehouse Company's warehouse early in the season or was it late?

A. I do not know; you will have to ask the warehouseman about that.

Q. Do you know a lot of that salmon was shipped out directly from the Carlisle Packing Company's warehouse?

A. I do not remember, I have too many things to think of to remember that.

Q. You have a great many things to think of?

A. Yes sir.

Q. And you do not charge your memory with those small things?

A. Not things that bookkeepers attend to.

Q. And it never occurred to you that in transactions of this kind involving $140,000 or $150,000 worth of salmon that it would be advisable for you to put it in writing and make a written contract with Mr. Wright?

A. I have done business with a great many people and of a larger volume than $150,000 deal and have never had any trouble.
339 I never had a lawsuit or a dispute over it in 26 years, therefore, I considered that a small thing.

Q. What did you understand from Mr. Wright and Mr. Wadhams when they came out and asked for the contract?

A. I thought Mr. Wright wanted to worry about it; he probably

had had some trouble of that kind. I told him I would, but it slipped my mind.

Q. You mean prepare a written contract?

A. Yes sir he asked for a contract.

Q. He came over after it?

A. He and Wadhams came together.

Q. You told him you would give it to him?

A. Yes sir.

Q. But you overlooked it?

A. I did.

Q. You never did put it in writing?

A. No.

Q. Are you sure that Mr. Wadhams was not in your office with Mr. Wright?

A. Absolutely sure.

Q. You are sure about that?

A. Yes sir.

Q. You have a great many men there to see you, and did at that time?

A. A good many, yes sir.

Q. Right along?

A. Yes sir.

Q. Do you remember every man that comes in there for 3 or 4 years back?

A. I remember every man that has been there on business of any importance.

340 Q. Mr. Wadhams has sworn positively in this case that he was there?

A. Yes sir.

Q. You are prepared to dispute that?

A. Yes sir.

Q. And if Mr. Wright swore positively that Mr. Wadhams was there you will dispute that?

A. Yes sir, I have disputed it.

Q. And you wish to adhere to that?

A. Yes sir.

Q. Was Mr. Wadhams ever in your office?

A. Yes sir.

Q. When was the last time he was there?

A. I presume about a year ago.

Q. Was here there any time during the spring of 1907?

A. Yes sir.

Q. How many times?

A. Once that I know of.

Q. What did he come there for?

A. Just to talk generally about the salmon business.

Q. Do you know when that was?

A. No.

Q. You signed these warehouse receipts did you not?

A. Yes sir (hands witness receipts referred to).

Q. And this one, this third one was signed by whom?

A. Mr. Brosseau, the secretary of the Bellingham Warehouse Company.

Q. You are its president, and was at that time?

A. Yes sir.

Q. And Mr. Brosseau is the man you say who has his office adjoining yours in the Pacific American Fisheries office?

A. No sir.

Q. I understood you to say that this morning?

341 A. No, Mr. Drisko.

Q. Who is Mr. Brosseau?

A. He is head bookkeeper and accountant for the Pacific American Fisheries.

Q. Where is his office?

A. In the main office.

Q. In the same building?

A. Yes sir.

Q. Is it not a fact that the officers of the Bellingham Warehouse Company are a part of the Pacific American Fisheries?

A. The president and secretary—the warehouse books are kept in the warehouse by the warehouseman, the general books are kept in the Pacific American Fisheries office.

Q. The Pacific American Fisheries was the owner of some of this stock, I believe you said?

A. There are a few shares, I believe.

Q. You are personally the owner of some of it?

A. Yes sir.

Q. All of the rest?

A. No sir.

Q. Where is the rest of it owned?

A. It is owned in Chicago and New York, about 25 different stockholders, 25 or 30.

Q. Are they the same persons that own the stock in the Pacific American Fisheries?

A. Yes sir.

Q. So it is really a part of the business of the Pacific American Fisheries?

A. It is not, it is a separate business entirely.

Q. But it is a subsidiary company?

342 A. No sir they are separate companies in every respect, it has nothing to do with the Pacific American Fisheries, but we store there and pay for the storage.

Q. It has the same stockholders as the Pacific American Fisheries?

A. Yes sir, that is what makes it good.

Q. Are Deming-Gould Company interested in this too?

A. No sir, only individually.

Q. The same individuals that are interested in the Deming-Gould-Company are interested here?

A. Yes sir they own stock.

Q. What other line of business are you in down there and besides this you have here?

A. I will have to get a piece of paper and write it down for you.

Mr. McCord: I object to his going further with this.
The Court: I presume this goes to the credibility of the witness.
Mr. McCord: I object to it as not being proper cross examination.
The Court: Let him answer.

Q. You were going to tell us, to give us an idea of the other lines of business you are engaged in.

A. Canned salmon business, brokerage business, warehouse business, canned food business in California, bakery business in St. Louis, proprietary medicine business in Chicago.

Q. When this salmon went into the warehouse, it was shipped out by you or your company with the understanding that you went up to the bank and it was paid for there and you took the warehouse receipt?

A. I think so, I did not do the shipping.

Q. I want to know the general course of the business, is that the way it was conducted, whenever you desired to ship any of the Carlisle pack that was stored in the Bellingham Warehouse Company's warehouses you made the payments to the First National Bank of this city, did you not?

343 A. I think so, yes.

Q. And then they would surrender the warehouse receipts and the salmon would be free as far as they were concerned?

A. Yes sir, and the money was placed to the credit of the Carlisle Packing Company.

Q. But you did the business through the bank?

A. Yes sir.

Q. I want to try to have you refresh your recollection with respect to the time you returned to Bellingham after the panic. I understand you went away about the 24th or 25th of October?

A. In thinking it over I believe I was back here by Christmas then, but I am not positive about it.

Q. You were back—you made two trips did you not that winter, you went back at the time you state just before the panic broke out, and came back along about Christmas and then you went East later?

A. I do not think so, I think I made but one trip that year.

Q. But you were back about Christmas, back here?

A. I think so, that is my recollection. If it is important I can look it up.

Mr. McCord: You can look it up in your records tonight, can you not?

A. Yes sir.

Q. Did you see Mr. Wright after your return at any time before the 5th of February?

A. Yes sir.

Q. Where?

A. In my office.

Q. What was the occasion of your meeting there?

A. He called to see me about having his salmon shipped and sold and getting the money for it.

Q. And you explained to him that you couldn't pay for
344 it on account of the panic conditions?

A. I told him I had lots of salmon lying around the country I could not get the money for and had a balance to our credit in the First National Bank of Chicago, but could not get that, and I could not borrow any money, and I told him he would have to wait until the banks loosened up.

Q. You wrote him that in a letter, did you not?

A. Yes sir.

Q. From Chicago? (Hands witness letter.)

A. From Chicago.

Q. And that was in answer to his telegram for money?

A. Yes sir. Orders and money, I think that is what the telegram referred to.

Q. That was for the salmon sold?

A. No, he asked for orders too, we have the telegram.

Q. Have you the telegram he sent you?

A. I think we have it. I think it is among those papers; I am not sure. (Mr. McCord hands Mr. Dorr telegram.)

Q. Is this the telegram? (Hands witness telegram.)

A. That is the one.

Mr. DORR: I ask that this be identified as plaintiff's identified exhibit number 36, and that it be introduced as a part of this cross-examination. (Plaintiff's exhibit 36 marked for identification.)

Mr. McCORD: No objection.

The COURT: It may be admitted in evidence.

Mr. DORR: I will read it at this time. "Bellingham, Washington, November 9, '07. E. B. Deming, care Deming & Gould, Chicago, Illinois. Why don't you pay for sockeyes as agreed and give me reasonable proportion orders. Men laid off and not paid. Answer quick; very important. Frank Wright."

Q. Do you remember a conversation with Mr. Wright
345 along in the latter part of December, 1907, in which you told him that he had better ship the salmon over to Bellingham as the time was nearly up now anyway and there wouldn't be any warehouse charges on it?

A. No sir.

Q. Did you not have such a conversation?

A. No sir.

Q. You have no recollection of it at all?

A. No.

Q. Did you ever have a conversation with him suggesting that he send over what was remaining in the cannery; did you ever have a talk with him about that subject?

A. Yes, I had a talk with him, about his salmon coming over. That was when he spoke about the insurance rate, and I told him it would be $1.10. I told him his insurance rate would be $1.10 and we would put it in the brick warehouse, some of it went into the other warehouse and he knew about it and asked about it and I told him his rate would be $1.10 just the same.

Q. Your company would stand the difference?
A. Yes sir.
Q. Why were you willing to make him that concession?
A. To get the storage for the company and I thought it was right and fair with him as I told him I would put it in the brick warehouse.
Q. You wanted to get the storage for the warehouse?
A. Yes sir, that was one reason because we got 25 cents a ton out of it; the Bellingham Warehouse Company did.
Q. You knew he had canceled his own insurance. You knew if the salmon was insured over there and was brought to your warehouse and you required the insurance to be written by your agent he would have to cancel his insurance and pay the short rates?
A. I did not know anything about it. He would make up
346 that difference in the difference in his insurance rate.
Q. Was that checked out between you?
A. No.
Q. Was it talked over between you?
A. I do not know.
Q. Did you have that in mind when you made this charge of $1.10?
A. I did.
Q. Did you mention the fact to him?
A. I do not know whether I did or not.
Q. You had no other reason except to get the storage on the salmon and you had it sent over there?
A. I did not have any reason; I was not particularly soliciting for business.
Q. You had expected to take this fish at the market price?
A. Yes sir.
Q. And having that in mind you wanted it over there?
A. No, it did not have to be over there when I took it.
Q. And this was close to the time?
A. It was a good ways from the time, it was a month anyway.
Q. About Christmas time the first of February was not very far off?
A. Thirty days.
Q. One of these warehouse bills is dated December 27th?
A. Yes sir.
Q. And another is dated February 5th, how did that come?
A. How did what come?
Q. That this warehouse receipt would be dated February 5th?
A. I do not know.
Q. You say there was not very much time between the date of the conversation you had with Mr. Wright respecting the transfer of the salmon from Lummi Island to Bellingham or South Bellingham, that there was not very much time between that date and the
347 date you expected to take the salmon?
A. But it is 25 cents a ton per month; the bank will charge interest for 5 days too. This was 25 cents a ton for 30 days. That

would amount to a good deal if you have a big block of salmon stored.

Q. There was not much time between the date you had the conversation and the date you expected to settle with him which was the 1st of February?

A. No.

Q. And before it was settled it had to be over there anyway?

A. That was not the stipulation, but I would have stipulated that.

Q. You would not have settled with him until it was shipped over?

A. No.

Q. Is is not perfectly reasonable under those condtions you would have suggested to him to send it over?

A. I do not know that it was, that was up to him.

Q. Did he know that?

A. Of course he did.

Q. He knew you would not settle until it was delivered here?

A. Yes sir.

Q. He had to pay the expense of bringing it over?

A. Yes sir.

(Whereupon court adjourned until 9:30 of the following day, at which time court opened according to adjournment, all parties being present as heretofore, counsel for plaintiff and for defendant- conceding the jury present the trial proceeded as before.

Mr. E. B. DEMING again taking the stand, the cross-examination by Mr. DORR was resumed:

Q. Since the adjournment yesterday have you determined the date of your return to Bellingham?

348 A. I looked it up. I got pretty near to it. I think from what Mr. Brosseau said I reached here the 6th, the 6th of December, I think he said the 6th of December, in other words about the fore part of December when I returned. I did not look up any other data.

Q. You are satisfied you were here on the 6th of December?

A. Yes sir, I will concede that.

Q. With reference to those sockeye half flats, had they been sold to the Pacific American Fisheries?

A. Not all of them.

Q. That lot that Mr. Wright was seeking the payment for, had that been sold to the Pacific American Fisheries?

A. No sir, it had all been sold though.

Q. They had been billed to the Pacific American Fisheries under your instructions?

A. All of them?

Q. No—that particular lot, 7444 cases?

A. No, I think not, only about 2,500.

Q. Was not 7444 cases billed to the Pacific American Fisheries under your instructions?

A. I do not think so.

Q. Are you positive about that?

A. No, I am not positive, but it is my recollection that 2500 were sold to the Pacific American Fisheries and paid for by the Pacific American Fisheries and the balance by Deming-Gould Company.

Q. Do you remember instructing Mr. Wright that 7444 cases were to be billed to the Pacific American Fisheries direct? Isn't that the lot of fish he was trying to get the money for and you promised to leave a check when you went away?

A. I did not promise to leave a check. That was the lot of fish that he was trying to get payment for.

Q. You had not told him to ship those over and you pay
349 for them right away?

A. Yes sir.

Q. Did you tell him to go to the office and get a check or draft for them?

A. I told him they would be paid for.

Q. Is that not the lot of fish?

A. Yes sir.

Q. Isn't that the same lot of fish you telegraphed from St. Louis about?

A. Yes sir.

Q. And isn't that the same lot of fish that Mr. Wright telegraphed to you to Chicago about and you wrote this letter about?

A. He telegraphed me about that and about other goods.

Q. He telegraphed "why don't you pay for the sockeyes as agreed?"

A. That is the lot.

Q. This telegram you sent from St. Louis is addressed to the Pacific American Fisheries?

A. Yes sir.

Q. And you were instructing the Pacific American Fisheries not to pay for those fish in that telegram?

A. No, that was addressed Pacific American Fisheries because there was no representative of Deming-Gould Company in Bellingham when I was in St. Louis and if the telegram was addressed to the Pacific American Fisheries I knew the proper party would get it.

Q. Who was the proper party if Deming-Gould Company did not have a representative here?

A. Mr. Brosseau or Mr. Drisko would get it, and if I had addressed it to Mr. Brosseau and he was not there probably nobody would get it.

Q. If Deming-Gould Company had no representative here what concern did you have about drawing that draft if—how did
350 the Pacific American Fisheries get into the case at all unless they bought these fish?

A. The Pacific American Fisheries were not in this case at all. I explained that Mr. Brosseau and Mr. Drisko attended to the Deming-Gould Company I believe when I am away, the greater part of it, and instructions were left, and any instructions I would send would have to go to them.

Q. Were any warehouse receipts issued for any of those 7444 cases of fish?
A. Yes sir.
Q. Are you sure about that?
A. Yes sir, they are in the book there.
Q. For this lot?
A. I presume it was that lot.
Q. Half flats?
A. Half flats.
Q. Were they not delivered to the Pacific American Fisheries?
A. No sir.
Q. And were they not shipped over as being sold to the Pacific American Fisheries?
A. No.
Q. Did the Pacific American Fisheries buy any of them?
A. Yes sir.
Q. How many?
A. I think 2500 or 2400 I do not remember exactly.
Q. When?
A. I cannot state that.
Q. Before you left?
A. Yes. I will explain that if you would like to have it.
Q. I would like to have it very much.

351 A. There were a great many car loads of salmon that were assorted cars, half flats of different grades, and what goods we sold to the Pacific American Fisheries of half flat sockeyes went to make up various assorted cars that was what was sold to the Pacific American Fisheries; they went into those assorted cars.

Q. And they just took them as they were required?
A. Yes sir.
Q. Do you know, as a matter of fact, that after those fish were shipped over here; this thirty odd thousand dollars' worth of them, the Carlisle Packing Company did not have anything to show for them?
A. No, I do not know that.
Q. They had no warehouse receipts, no money and no due bill, no memorandum of credit—nothing.
A. No, I do not know because it was shipped over after I left.
Q. Just about the time you left?
A. No, after I left.
Q. You are sure about that?
A. I am pretty sure, from the records in the books.
Q. What books?
A. The warehouse books.
Q. Will you show where those fish ever went into the warehouse?
A. I will try to. (Witness is handed books.) I am not the warehouse bookkeeper. I am simply going by memoranda. Here is a warehouse receipt, number 7,7444 cases unlabeled half flat sockeyes.
Q. What is the date of that?
A. November 2.

Q. Will you show me any endorsement on that warehouse receipt?

A. No, I do not see any.

Q. Would you say it was delivered?

A. No, I would not say so because it was delivered after I was away.

352 Q. If it had been delivered to the Carlisle Packing Company it would be endorsed?

A. Yes sir, probably it was not delivered, but I had no knowledge of that.

Q. As far as the Carlisle Packing Company was concerned there is no evidence that they ever had that receipt?

A. No.

Q. After you left here for the Eastern trip, did you communicate with your office in South Bellingham on the payment or non-payment of this bill, before you reached St. Louis?

A. I did not.

Q. Notwithstanding the panic struck you on the way?

A. It did not strike me on the way; it struck the day I landed at Minneapolis.

Q. And you sent no word back?

A. No sir.

Q. You sent no telegram directing the office not to pay anything?

A. Not until I arrived at St. Louis.

Q. You sent no such general telegram as counsel asked Mr. Wright about if he had seen referring to all drafts?

A. No, I had no reason to because I did not know about the seriousness of the panic until reaching St. Louis.

Q. You had told Mr. Wright to go and get the money?

A. I told Mr. Wright the goods would be paid for and I told Mr Purdy the goods would be paid for, and they would have been paid for if there had been any way to get the money to pay for them.

Q. I do not doubt that.

A. We had money in the bank, but they would not let us have it.

Redirect examination of Mr. E. B. DEMING by Mr. McCORD:

Q. Referring to the matter of this contract that Mr. Wright testified was made for the taking over of all of the unsold salmon

353 on February 1, 1908, at the opening prices, I will ask if that sort of a contract was customary among the buyers and sellers of salmon on the Puget Sound at that time, and that year and in other years?

Mr. DORR: I object as being incompetent, irrelevant, immaterial and not proper re-direct examination.

Mr. McCORD: It is a question I overlooked, your Honor.

Mr. DORR: We object to it as though it had been offered on the original examination. We make no objection to it on that ground. We object to it because it calls for incompetent evidence (argument).

The COURT: The objection is sustained. A specific contract is alleged; a party under such a contract would have the right to show

what the reasonable price was at the time with a view of showing the probability or improbability of the contract that was made. I have in mind the hop case, I believe. I do not believe you are within that rule. I think you are trying now to introduce an alleged custom as against a specific contract.

Mr. McCORD: No, I want to show, not to contradict the contract, but to show whether that sort of a contract was ever made. (Argument.)

The COURT: You cannot introduce evidence of a custom as against an express contract. You have the right if it is alleged that the contract was made at a specific price at a given time to show the reasonable market price of that commodity at that time for the purpose of showing the probability or improbability of that price and I will permit you to go into that, but not the question of custom. I think I will let you go this far in addition to show whether or not these parties had any such contract other than the one stated here.

Q. Go ahead, state whether you had any such contract or whether such a contract was usual?

Mr. DORR: I object to that.

354 The COURT: No, you can show what the reasonable market price was at that time by this witness, and also show whether he had any contract of this character. I will permit that.

Q. Did you have any contract of this character with any party during 1907 by which you agreed to take over all the unsold salmon on February 1st, whether you had any contract with anybody during 1907 or in any other year, and specially during 1909?

A. I never made any such a contract.

Mr. McCORD: I desire to elicit from this witness the fact that in 1907 when this alleged contract was made that there was no such custom; that such a contract was unheard of on Puget Sound among salmon brokers. I want to offer this as bearing upon the question solely of whether or not any such a contract as claimed by the plaintiff was ever executed at all. It is bearing on the question of whether such a contract was executed, and it is for that purpose that I want to elicit that information.

The COURT: I do not think you can go into such an inquiry as against an alleged specific contract. You want to know from this witness, as I understand it, whether such a contract was the custom.

Q. I will ask you if in all your experience as a salmon broker on Puget Sound you ever knew of any contract ever being made between any salmon broker, any salmon buyer, and salmon seller, by which the buyer in consideration of handling the pack on a brokerage basis agreed to take over on February 1st of the following year, or at any other time in the future all of the unsold pack at the opening prices, and whether such a contract in your judgment would be reasonable?

Mr. DORR: I object as incompetent and immaterial.

The COURT: Objection sustained.

Mr. McCORD: I will offer at this time to introduce——

355 The COURT: Ask your questions and I will pass on the questions. I am not preventing you from asking any questions you may wish.

Q. I will ask you from your knowledge of the salmon brokerage business on Puget Sound whether you have ever known of the existence of a contract such as the one that Mr. Wright has testified to in this case by the terms of which, as he testifies, it was provided that the contract made in February or March, 1907, should require the buyer to take over all of the unsold salmon on the following February at the opening prices made in August, 1907?

Mr. DORR: I object as being immaterial, calling for incompetent evidence, and an attempt to establish a custom which would not bear upon this case.

The COURT: The objection is sustained.

Q. I will ask you if in all of your experience in the salmon business you ever knew of any buyer of salmon agreeing to take over a year before the time that the goods were to be taken over, the unsold portions of the pack for the year, the particular year, at the opening prices of the salmon, when the alleged contract was made in March, the opening prices to be fixed in August and the goods to be taken over in the following February?

Mr. DORR: I make the same objection for the same reasons.

The COURT: The objection is sustained.

Mr. McCORD: I desire to ask these questions and this line of questions for the sole and only purpose of showing the probability or improbability of the testimony of the plaintiff or the defendant as to the fact of the execution of the contract, not to vary the terms of it or modify it, or to show that it was unreasonable when executed, but to show the probability or improbability of such a contract.

The COURT: I do not think you are within the rule. I think the effect of it is to show such things were customary as against a

356 specific contract alleged in this case. Show what the rate was as you claim and let the jury determine whether or not it is probable that such a contract would have been made. (Argument.)

Q. Mr. Deming, we will assume that a contract was made in the month of March, 1907, for the handling of the pack of salmon for the year 1907, of a particular packer for the handling of the entire pack, by which the buyer was to receive a commission of 5% brokerage and 1½% cash discount, the goods were to be sold from time to time during the season at the opening prices and to be paid for in drafts at ten days' sight after delivery of bill of lading, that all of the unsold salmon not disposed of to third parties previous to the 1st day of February, 1908, was to be taken over on that date at the prices fixed in August of the previous year, the prices not being fixed at the time the contract was made; I will ask you if there was any custom among salmon brokers or buyers on Puget Sound in 1907 warranting or justifying any such a contract, or do you know of any such a

custom providing for any such a contract, and would you say it was reasonable or unreasonable, that is, such a contract?

Mr. DORR: We object for the reason the evidence sought to be elicited is immaterial and incompetent. It calls for a custom which cannot bind the plaintiff in this case and is incompetent for any purpose.

The COURT: The objection is sustained. (Exception allowed defendants.)

Q. In Mr. Wright's testimony he stated that a certain can contract for the cans of 1907 to be used in his pack was modified. Was this from the written contract; was there any modification of that contract after it was made?

A. No sir.

Q. The written contract was the contract that was in force
357 and remained in force, is that right?

A. Yes sir. That is right.

Q. I will ask you if at any time either in March or February, 1907, or later in December or at any other time, over the phone or by word of mouth you ever stated to Mr. Wright or to any officer of the Carlisle Packing Company that you would take the unsold salmon on February 1st and pay for them at the opening prices.

A. I never did.

Recross-examination of Mr. E. B DEMING by Mr. DORR:.

Q. Mr. Wright was at your office in South Bellingham on February 5th before the meeting in the bank on that day, was he not?

A. I do not know whether that day or the day before, about that time.

Q. Did you not tell him then that if you could get the money you would pay for the salmon?

Q. What are you referring to—these salmon, all of them?

Q. All of them?

A. I did not.

Q. What did you tell him?

A. I told him I would take his tall salmon and the other salmon he had unsold there at the price fixed 80 cents.

Q. Was there any proviso about it?

A. Provided I could get the money, yes sir.

Q. Didn't this occur; he went over there for a settlement, didn't he, that was the object of his visit?

A. I do not know what his object was.

Q. It was the 5th or about the 5th of February and you had agreed to take all the salmon on the first of February, originally?

A. Under certain conditions.

Q. Under the market conditions, as you say?

A. Yes sir.

358 Q. That was your understanding of the original arrangement?

**A. Yes sir.**

Q. Then the time was up for the final settlement?
A. Yes sir.
Q. And he was there for that purpose?
A. I presume so, I do not know that.
Q. You told him you couldn't pay because you couldn't get the money?
A. Yes sir.
Q. And he asked you if it were made possible for you to get the money if you would pay?
A. Not exactly, that is not the way he put it.
Q. If he could arrange for you to borrow the money you would pay is that right?
A. Not just right; I will give it to you just right. I told him that if I could get Mr. Purdy to loan us the money and take our notes we would take up the salmon.
Q. There was nothing said about the price at that meeting?
A. Certainly there was, yes.
Q. About the price?
A. The price of the talls.
Q. At that meeting?
A. Yes sir, at that meeting.
Q. The price of the flats?
A. Yes sir.
Q. And the other prices were all gone over?
A. Yes sir.
Q. And they were all the opening prices?
A. No.
Q. Except——
A. The flats.
359 The COURT: Did I understand all the prices were at the opening prices except the pink flats?
Mr. DORR: That is as I understand it. Is that right, Mr. Deming?
A. Yes sir.
Q. On those did you make a specific offer in Fairhaven?
A. Yes sir.
Q. At that time?
A. Yes sir.
Q. I understood yesterday you made the offer in the bank?
A. Yes sir, in both places.
Q. You withdrew it before you left the bank?
A. No, I did not withdraw any offer—he did.
Q. Mr. McCord asked you if you ever made any contract either in 1907 or any other year by which you agreed to take absolutely the unsold pack of any packer at the opening prices at a later date, and you said no, is that right?
A. I did.
Q. You never did that?
A. Not that I know of, no.
Q. Nor any portion of the pack?
A. I did not say that.
Q. What is the fact about that?

A. I do not know.

Q. Do you not know you have made a great many contracts by which you agreed to take 50% of it?

A. I did not.

Q. I hand you this printed blank that I have (hands witness blank) and ask if that is one of the Deming-Gould Company's forms?

A. That is.

Q. Prepared by them—by you, that is a printed form, is it not prepared by you?

360 A. No sir, we never had any printed forms, this is not a copy of one of our contracts.

Q. Is that not one of your blanks?

A. No sir, we never had any of these blanks.

Q. Do you mean to say that is not a printed form?

A. No, we never made any printed contracts. There is the way they are all made, every one of them; that was made with the packer in 1909, on that same kind of paper, (witness hands counsel paper).

Q. There is no difference between section 2 here and section 2 there (hands witness both papers, indicating).

A. That is right.

Q. Except the word February 1—inserted?

A. That is right.

Q. Did you have many of these?

A. Why, I think we had contracts with 6 or 7 packers.

Q. Six or seven?

A. I think there were.

Q. I will ask that this contract be identified and introduced in evidence as a part of the cross examination.

Mr. McCord: No objection. I would like to withdraw it and substitute a copy.

The Court: Very well. (Plaintiff's exhibit 37 marked.)

Second redirect examination of Mr. E. B. Deming by Mr. McCord:

Q. I desire to call your attention to plaintiff's exhibit 37 and particularly that paragraph and ask you how many of those contracts you executed during the year 1907, if you know?

A. I did not execute any in 1907.

Q. In 1908?

A. No.

Q. You did not execute any contracts of that character until 1909?

A. No.

Q. I will ask you to explain what you mean by saying you

361 never agreed to take over or to buy 50% of the pack remaining unsold at the opening prices? Read that second paragraph.

A. (Witness reads:) "Deming and Gould Company agrees to sell at least fifty per cent of all of the sockeye salmon packed by packer at the opening market prices for the season 1909 as fixed by the Pacific American Fisheries and the Alaska Packers Association, and

all of said 50% of said Salmon shall be taken from the packer not later than February 1st, 1910, at such opening market prices."

Q. Did you agree to sell 50%?

A. Yes sir. I never agreed to buy 50% or to take 50%, I agreed to see that 50% was taken, because we knew it was easy to sell 50% of the sockeye salmon.

Q. What kind of salmon have you reference to?

A. Sockeye salmon.

Q. Did it have reference to any other variety?

A. None whatever.

Q. What have you to say as to the facility with which sockeye salmon packed on Puget Sound can be marketed?

A. We made this contract to sell 50% of it because we knew it was an easy matter to sell it, that the market was bare and that it would be no effort to sell 50% of them, and this was always to be subject to the packer's confirmation. He was not bound to sell these goods at the opening prices.

Q. Would it have been a reasonable contract to have executed to take all the salmon of all varieties at the opening prices?

Mr. DORR: I object as incompetent. We are talking about a contract he made.

The COURT: Objection sustained.

Second recross-examination of Mr. E. B. DEMING by Mr. DORR:

Q. Just a distinction without a difference, whether you agreed to buy or guaranteed to have sold?

362 A. No sir.

Q. In that event you bound yourself to see that the packer got his money?

A. We agreed to sell 50% if we could not he would have some action for damages against us. We did not agree to buy them.

Questions by the COURT:

Q. If I understood you a while ago you stated you agreed to take certain salmon at this conversation about the 5th of February at the opening price other than the pink salmon in question?

A. Yes sir.

Q. If that is correct, I will ask you this question: was there any difference at that time between the market price then prevailing and what you have referred to as the opening price, as to those salmon you have mentioned?

A. No. We were willing to take the goods at that——

Mr. MCCORD: I do not know that I understand the question.

The COURT: If I got his answer he said he agreed to take over certain salmon other than the pinks at the opening prices, what I am getting at was that correct, and if so, was there any difference between the then market price and what was referred to as the opening prices on that particular goods?

A. In my opinion——

Q. I am not referring to the flat pinks?

A. The other grades of salmon were in a better position than the flat pinks and the market price was better on those than on the flat pinks, therefore, I was willing to take them over at the opening price and I considered that the market price.

Third recross-examination of Mr. E. B. DEMING by Mr. DORR:

Q. As a matter of fact the sockeyes had gone up?

A. I do not believe so.

Q. Do you not know they were at a premium?

363 A. No, I do not, because ours were not.

Q. They advanced at least 40 cents on the case?

A. No, ours did not.

Q. I am speaking about the outside market?

A. I do not know anything about the outside market. Some man might have held his goods at that price, and somebody might have been able to sell a few cases at that price; one swallow does not make a summer.

Q. They were in good demand at all times?

The COURT: I was speaking of February 5th.

A. No, not in good demand on February 5th.

Q. Did you sell any at the opening price on February 5th?

A. I do not know, probably I did.

Q. You know you did not sell for less?

A. Yes sir.

Third redirect examination of Mr. E. B. DEMING by Mr. MCCORD:

Q. On February 5th what have you to say as to the demand for tall pinks as compared with the demand for sockeyes?

A. There was not much of a demand for anything along about February 5th, the market was quiet.

Q. Taking into consideration the market conditions in the salmon business during the year 1907 and the circumstances, I will ask you to state whether in your judgment, from your experience as a salmon broker and a buyer and manufacturer it would have been reasonable for anybody to have made a contract by which the buyer agreed to take over on February 1st almost a year after the contract was executed the entire unsold pack of all varieties and all grades of salmon at the unfixed opening prices which unfixed opening prices were to be made, however, later on, some 5 or 6 months after the date of the contract.

Mr. DORR: I object for the reason the question calls for in-

364 competent evidence, immaterial in this case. No foundation has been laid at all for the witness to answer.

The COURT: Objection sustained. (Exception allowed defendants.)

(Whereupon the witness was excused and left the stand.)

Mr. H. B. DRISKO, being called as a witness on behalf of the defendants, after being first duly sworn testified as follows:

Direct examination by Mr. MCCORD:

Q. Where do you live?
A. In Bellingham.
Q. What is your business?
A. I am with the Pacific American Fisheries.
Q. How long have you been employed by that company?
A. Since 1905.
Q. What is your position with them?
A. Well, I have direct charge of the shipping under Mr. Deming.
Q. Are you acquainted with Mr. Frank Wright?
A. I am.
Q. Are you acquainted with Arthur Wadhams?
A. Yes sir, I am.
Q. How long have you known them?
A. I have known Mr. Wright since about 1902, I think.
Q. How long have you known Mr. Wadhams?
A. About the same time, maybe a year later than I met him first.
Q. Does your business with the Pacific American Fisheries bring you in contact with Mr. Deming, and if so, to what extent?
A. I have the next room to him, everybody going into his room has to pass through mine.

Q. How is your room located with reference to the hall-
365 way passing from the main hall back to Mr. Deming's office?
A. It is at the end, as it were, of the main hall, and you go through mine to get to his room.
Q. Your office is next to his?
A. Yes sir.
Q. What sort of an office has he—is it inclosed with a door?
A. Yes sir.
Q. Has your office a door or a railing?
A. It has a railing now between this narrow hallway that goes through my office room into Mr. Deming's room; at that time it was all open, one room.
Q. You sit right there at Mr. Deming's door then?
A. Yes sir.
Q. In 1907 in the months of February and March, I will ask you if you knew of the negotiations for the handling of the salmon pack of 1907 by Mr. Deming and the Carlisle Packing Company?

Mr. DORR: We object to that unless he knew from Mr. Wright.
The COURT: I presume that is preliminary, he may answer yes or no.
A. About the salmon contract?
Q. Yes.
A. No, not the details, but I knew of the fact of the negotiations of the contract being under discussion—I do not know whether I understood the question.
Q. For the purpose of fixing the time, I will ask if you know when

the can contract was executed between the Carlisle Packing Company and the Pacific American Fisheries?

A. I know when the contract was negotiated.

Q. When was that?

A. It was along in the middle of February, right around in that time.

366 Q. Shortly after that, I will ask you if you heard of any discussion not as to the particular terms of it, but as to the fact of a discussion between Mr. Wright and Mr. Deming about the purchase of the Carlisle Packing Company's pack by Mr. Deming for 1907?

Mr. DORR: We object unless the plaintiff was present.

Mr. MCCORD: He was present, I will show the plaintiff was present.

Mr. DORR: Anything he heard from Mr. Deming aside from Mr. Wright, when Mr. Wright was not present, would not be competent.

Mr. MCCORD: I am not going to show what Mr. Deming told him, but I am trying to fix the time when these negotiations were had by him and Mr. Wright.

The COURT: Go ahead.

Q. I will ask if you knew at the time this salmon contract was under consideration?

A. I remember the discussion on the can contract and I overheard some of the salmon—that is that there was a deal on of some kind but the terms or anything further, I do not know.

Q. Now when was that deal being discussed with reference to the execution of the can contract, was it before or after?

A. I think it was after.

Q. Did you see Mr. Wright in Mr. Deming's office at that time?

A. Yes sir.

Q. How many times?

A. I saw him twice, I think.

Q. Did you see him pass into Mr. Deming's office?

A. Yes sir.

Q. I will ask you about how long were those negotiations on, that deal, about how many days approximately?

A. I think along about the 15th he came there to see about the can contract.

Q. The 15th of February?

367 A. Yes sir, and he was there the day the contract was signed up, about the 21st or 23rd of February.

Q. How long after that was it you heard negotiations or discussion for the sale of the salmon?

A. I do not remember.

Q. I thought you said a few days after that. How long a period of time was this salmon deal under consideration by Mr. Deming and Mr. Wright?

A. I think these two times.

Q. When was the second conversation with reference to the first? How far apart were they?

A. About a week, something like that.

Q. I will ask you to state your opportunity for seeing people that went into Mr. Deming's office at that time?

Mr. DORR: I object as leading and calling for a conclusion, let him state the conditions there.

The COURT: Yes, state the conditions.

A. They all have to pass through my room.

Q. And they have to pass through your room to do what?

A. To get to Mr. Deming's room.

Q. I will ask you what was the usual and customary way of access by the public generally from the street to Mr. Deming's office with reference to your room?

A. They generally come and ask if he is busy and if he can be seen.

Q. How do they have to go to get to Mr. Deming's room?

A. They have to go through my room.

Q. Everybody?

A. Yes sir.

Q. I will ask if you were in the room—how much of your time did you put in at that place?

A. About 365 days in the year.

368 Q. How many hours in the day?

A. From half past 7 during the season until 10 or 11 o'clock at night.

Q. While this salmon deal was under discussion, I will ask you if you ever saw Mr. Arthur Wadhams pass into Mr. Deming's office with Mr. Wright or separately?

A. No. I did not see him there with Mr. Wright.

Q. Would you have seen him if he had been there?

Mr. DORR: We object as being incompetent; that is for the jury to determine.

The COURT: In the form it is in it is objectionable; objection sustained.

Q. I will ask you if Mr. Wright and Mr. Wadhams had passed into Mr. Deming's office at about the time you have indicated when this can contract was under consideration whether you would have had an opportunity to see them if they had done so?

A. Yes sir.

Q. Did you ever see Mr. Wright during these negotiations enter Mr. Deming's office alone on these two occasions?

A. Yes sir.

Q. When Mr. Wright was in there on these two occasions when the contract was being discussed in Mr. Deming's office, I will ask if Mr. Wadhams was present?

A. No sir.

Cross-examination of Mr. H. B. DRISKO by Mr. DORR:

Q. You have been there since 1905?
A. Yes sir.
Q. And 365 days in the year?
A. Yes sir.
Q. In that room all the time?
A. Not quite.
369 Q. All the day time from 7 o'clock in the morning for 16 hours?
A. I will modify that a little. During the busy season I would be there 16 or 18 hours a day, and during the other time I would be there from 8 to about 6:30.
Q. Do you mean to say you never leave that room?
A. I might step out.
Q. Do you not go to the warehouse and cannery?
A. Sometimes.
Q. Do you have to do with the shipping of cans?
A. I generally direct it. I do not do the direct shipping.
Q. Where are those cans stored from the office?
A. Some in the cannery and some in the Bellingham Warehouse Company's warehouse.
Q. Do you want the jury to understand you were there constantly as a door keeper for Mr. Deming?
A. I might not be there constantly, but my work keeps me there most of the time.
Q. You are in and out, are you not?
A. Yes sir.
Q. And all around the premises?
A. No sir, I have a telephone and do not have to run all around.
Q. Do you not go out once in a while to see what is going on?
A. Sometimes.
Q. Quite frequently, do you not?
A. When occasion demands, yes sir.
Q. I want you to take a paper, if you will, and make a sketch of that office as it was then—it has been changed since, I understand. (Witness makes drawing.) I want you to show this to the jury and explain whose rooms those are.

(Witness takes diagram and indicates to jury different rooms, directions, car track etc.)

Q. Is that a solid partition (indicating)?
370 A. Yes sir.
Q. Describe the character of the partition between the rooms?
A. This partition here, I think is a single partition (indicating) just tongue and groove boards.
Q. That is the partition between your room and Mr. Deming's?
A. Yes sir.
Q. With a board door?
A. Yes sir, an ordinary door.

Q. That is Mr. Deming's private office?
A. Yes sir.
Q. It is not intended for you to hear through that partition?
A. No, not necessarily, but one cannot help but hear if a man talks in an ordinary voice.
Q. And there is a back door in the rear of Mr. Deming's room?
A. Yes sir.
Q. And a general door over here (indicating on diagram)?
A. Yes sir, leading out to the machine shop.
Q. And the front door is on the west side?
A. Yes sir. I guess you would call that the west side, it is toward the Great Northern depot, southerly and westerly.
Q. Did you ever see Arthur Wadhams there at any time?
A. I saw Arthur Wadhams there last spring.
Q. Did you ever see him there at any time in 1907?
A. I do not remember seeing him there.
Q. Do you know whether he was there or not?
A. I am quite certain he was not there at this particular time.
Q. Do you know whether or not he was there at any time at all in 1907?
A. I do not think he was.
Q. You will swear he was not there at any time during that season?
A. I do not think he was there that spring at all.
371 Q. You do not pretend to have heard any part of the conversation between Mr. Wright and Mr. Deming?
A. I could not help but hear some of it, but the detail of it I would not attempt to follow.
Q. What time in the day was it that Mr. Wright came there, the first time?
A. I think in the morning.
Q. What time in the morning?
A. About 9:30 or 10 o'clock.
Q. Was he all alone?
A. Yes sir.
Q. Did he come to you, did he come and ask you permission to go in?
A. No sir, he just asked if Mr. Deming was busy, and I said no, and he stepped in.
Q. How long was he there?
A. I do not know.
Q. Was he there very long, was it a long interview or a short one?
A. I presume it was an hour.
Q. Was that with reference to the cans?
A. Yes sir.
Q. And later on the can contract was made?
A. Yes sir.
Q. And he came back for that?
A. Yes sir.
Q. What day do you remember?

A. I think about the 21st or 23d.

Q. Why do you say the 21st or 23d, why not the 22d, what is there in the case that fixes those dates on your mind?

A. I have seen the date on that contract; I know it was the 21st or the 23d.

372 Q. You have no independent recollection of it, independent of the date on the contract?

A. No.

Q. Is it not a fact that you are fixing these dates from the date found written in the contract?

A. What other date would I fix the time from.

Q. The dates of these interviews are the dates you see in the contract?

A. The first time that Mr. Wright was there was about a week or ten days before the signing of the contract, if my memory serves me right.

Q. If the contract was dated the 23d it would be a week or ten days before that date?

A. Yes sir.

Q. When was he next there, was he there the day the contract was signed?

A. I think he was.

Q. Did you draw that contract?

A. No sir.

Q. Did you have anything to do with it?

A. After it was signed I had a memorandum copy to ship the cans by.

Q. When was Mr. Wright there the next time?

A. He was there off and on all summer.

Q. How many times was he there in the spring? What do you mean by off and on, how often was he there?

A. He might have been there once a week.

Q. Was he ever there when you did not see him go in?

A. He might have been.

Q. It was possible was it?

A. Yes sir.

Q. He was there every week during the season and summer, the spring and summer?

373 A. I would not say that he was there very often. When he was over in town he would generally drop in.

Q. He generally went to see Mr. Deming?

A. Yes sir.

Q. And you never saw Arthur Wadhams there at any time?

A. No sir.

Redirect examination of Mr. H. B. DRISKO by Mr. MCCORD:

Q. How do people who go in Mr. Deming's office leave when they go out?

A. They generally leave the way they go in, out through the front way.

Q. The back door of Mr. Deming's office does not open on the street?
A. It opens on the railroad.
Q. How far is the door from the railroad track?
A. About 8 feet.

Recross-examination of Mr. H. B. DRISKO by Mr. DORR:

Q. You do not mean to say they always go out the front door, everybody?
A. He hardly ever lets anybody out that way unless he was going out to the cannery with him?
Q. That was the short way, the natural way to go to the cannery?
A. Yes sir.

Mr. DORR: In connection with the cross-examination of this witness I would like to introduce this plat.
Mr. MCCORD: I have no objection.
The COURT: It may be admitted.
(Plaintiff's exhibit 38 marked, above referred to.)
(Whereupon the witness was excused and left the stand.)

374 Mr. E. B. DEMING, being re-called on behalf of the defendants, testified as follows:

Direct examination by Mr. MCCORD:

Q. I think you and Mr. Wright testified that Mr. Wright requested you to make up a form for your proposed contract for this salmon. I will ask if he asked you for it on more than one occasion, than the one time you testified about?
A. Yes, sir, once.
Q. Any more than once?
A. No.

Cross-examination of Mr. E. B. DEMING by Mr. DORR:

Q. When was this once?
A. It was along sometime after the second interview at the time that Mr. Wadhams was with him, out at the cannery.
Q. When you made your agreement it was understood you were to put it in writing?
A. Yes, sir.
Q. Then once after that he asked you for it?
A. Yes, sir.
Q. And you told him that you would do so?
A. Yes, sir.
Mr. MCCORD: He never asked for it any more?
A. No.

(Whereupon the witness was excused and left the stand.)
Mr. MCCORD: The defendants rest.

*Plaintiff's Rebuttal.*

Mr. E. W. PURDY, being re-called on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination by Mr. DORR:

375 Q. In reference to the storing of the salmon of the Carlisle Packing Company in the season of 1907 state what arrangement, if any, you had for obtaining warehouse receipts for the salmon stored on the premises of the Carlisle Packing Company?

A. They were in the warehouse there at the cannery and they issued warehouse receipts. The warehouse was a separate custodian from the cannery. If I remember correctly Frank Wright was the custodian that year.

Q. Did you have any question about his reliability as such custodian?

Mr. MCCORD: I object as being immaterial.

Mr. DORR: Mr. Deming testified that was the reason it was sent over here to South Bellingham. We claim the salmon was brought over here at Mr. Deming's instance and request. Mr. Deming says the reason it was brought over here was that Mr. Purdy was fearful of the security over there; I want to know what the facts are *are*.

The COURT: You can inquire as to the facts.

Q. Please state the facts Mr. Purdy.

A. You mean what part I had to do with bringing the salmon over?

A. Yes, sir.

A. I had nothing to do with it.

Mr. MCCORD: I move to strike the answer as not responsive. He is not stating any facts at all, he is stating conclusions. Mr. Purdy asked counsel a question and he asked a question back and I think the answer was not responsive as I caught the question.

The COURT: The motion is denied.

Q. Were you satisfied with your security over at the Carlisle Packing Company's warehouse?

Mr. MCCORD: I object as incompetent and immaterial.

The COURT: He may answer.

A. We certainly were, we had loaned a great deal of money
376 a number of years at the same place.

Q. Did you ever tell Mr. Deming that you wanted the salmon put in a public warehouse to improve your security?

A. I do not think so.

Q. Referring to the spring of 1907 you recall the time that Mr. Wright reported to you that he had made a contract with Mr. Deming?

A. Why yes.

Q. Who was with him?

Mr. McCord: I object as not proper rebuttal, incompetent, irrelevant and immaterial, and I move to strike the answer.

Mr. Dorr: That is a preliminary question.

The Court: Go ahead.

Q. Who was with him, if anyone?

Mr. McCord: I object as immaterial; he cannot testify what Mr. Wright told him.

Mr. Dorr: I am just trying to find out who was there.

The Court: He may answer.

A. When?

Q. When Mr. Wright reported the making of the contract with Mr. Deming that spring?

Mr. McCord: I object as not being proper evidence, irrelevant, incompetent, immaterial. You could not put that in evidence unless it was in the presence of Mr. Deming. I object to counsel assuming some incompetent and irrelevant and immaterial testimony.

The Court: The objection is sustained.

Mr. Dorr: Mr. Purdy testified he did not know the terms of the contract, and I am not trying to prove that at all, I am trying to fix the time that certain parties were present.

Mr. McCord: You must not prove the time by bringing in improper testimony.

The Court: If you want to fix the time when he got this
377 information. You may direct his attention to that.

Q. What time, if any, did you receive the information that spring?

Mr. McCord: I object as immaterial, incompetent, not proper rebuttal testimony.

Mr. Dorr: If you want to take more time, I will do it. You testified when on the stand before that Mr. Deming had made certain statements to you with reference to the purchase of this fish, did you not?

A. Yes, sir.

Q. With reference to that time was Mr. Wright at any time at your bank to see about the matter?

Mr. McCord: I object as immaterial. It does not make any difference whether Mr. Wright was there or not, that would not be competent testimony as against the defendants, and it is not proper rebuttal.

The Court: I will let him answer this question.

A. Yes, sir.

Q. Who was with him, if anyone?

A. He was there a number of times alone and sometimes Mr. Wadhams was with him.

Q. What Mr. Wadhams?

A. Arthur Wadhams.

Q. What were they there for at that time?

Mr. McCord: I object as incompetent, irrelevant and immaterial

whatever communication was had or what was said or done as against the defendants.

The COURT: If he knows what they were there in connection with he can state in so many words what that was, but he cannot go into the details. (Last question read.)

Mr. McCORD: I object on the further ground it is asking for a conclusion of the witness.

378 The COURT: I believe the objection ought to be sustained as to the form of that question. I did not notice the ending of it before.

Q. State, if you know, why Mr. Wright and Mr. Wadhams came to your bank at that time?

Mr. McCORD: I object as being irrelevant, incompetent and immaterial, asking for the result necessarily of communications made in the absence of the defendants and asking for a conclusion of the witness.

The COURT: He can state the fact in connection with what business, if he knows, that they came there on.

Q. What business did they come there on?

A. On the cannery business.

Q. With respect to the date and time that Mr. Deming made this statement to you that you testified to the other day was it before that date to your knowledge that Arthur Wadhams and Mr. Wright came to your bank?

Mr. McCORD: I object as being immaterial.

The COURT: Let the witness answer.

A. About the same time, they were there a number of times just about that time telling about the contract.

Mr. McCORD: I move to strike the answer about what they were telling him.

The COURT: That may be stricken. The jury will disregard that statement.

Cross-examination of Mr. E. W. PURDY by Mr. McCORD:

Q. You had these warehouse receipts over in the cannery building?

A. Yes, sir, in a part of the cannery building.

Q. Do you not remember along in the late summer or fall of 1907 stating to Mr. Deming that you wanted to go over to examine an- investigate that warehouse business at Lummi Island,

379 and did you not in fact after that conversation go over on one of Mr. Deming's boats, and did you not state at that time, not that you distrusted Mr. Wright, but you questioned the security of a private warehouse man, and preferred because of the amount of money you had loaned on that pack, to have it in a public warehouse, and have warehouse receipts on it? I do not mean to reflect on Mr. Wright as not being a proper warehouseman, but as to the legality of that sort of security, did you not say you

would rather have negotiable warehouse receipts of a warehouseman engaged in that business.

Mr. DORR: I object to the question as being incompetent, irrelevant and immaterial. I make the same objection you did to the conversation in the bank.

The COURT: I think you are calling for a statement between him and Mr. Deming.

Mr. DORR: I do not care, go ahead.

A. I think that what happened at that time, it was before there was very much fish in the warehouse and the question came up how they were to be partioned off and I asked Mr. Deming's advice and he told what would be necessary, to separate it from the balance. I have no hesitancy in saying that a public warehouse would be preferable to a banker than under the same roof that the fish were canned. I do not think we had a dollar against the fish at that time and we advanced money, thousands of dollars, before they came over here.

Q. You had some opinion in the fall of 1907 as to the preferability of one warehouse receipt over another. You would not say that you told Mr. Deming that you preferred a public warehouse receipt?

A. I would not say that I had in any way any doubt about Mr. Wright taking care of those fish; I had absolute confidence in Mr. Wright.

Q. You questioned the character of that sort of security as compared with the warehouse receipts of an independent warehouseman?

380 A. Not at that time. I do not think so. I think what I told Mr. Deming was I told him to show me before the fish was put in what he would consider proper to make that receipt full and complete. That was before we made our advancements.

Q. Would you not say that you told Mr. Deming you preferred to have the fish brought over and put in an independent warehouse; would you say you did not have any such conversation?

A. I may have in a conversation with Mr. Deming said that I preferred an independent warehouse. I always did prefer an independent warehouse.

Mr. DORR: That was not in reference to this movement in the winter?

A. I had nothing whatever to do with that movement.

Q. Will you say you did not discuss with Mr. Deming the desirability of getting these fish brought over and put in the warehouse, all of Mr. Wright's pack.

A. I may have that day when I was over, I no doubt discussed that. That I would have preferred it.

Q. Might it not have been later?

A. No, I do not think so.

Q. You frequently discussed this matter of this salmon with Mr. Deming, on numerous occasions, during the fall?

A. Yes, sir.

Q. During those numerous conversations you will not say you did not indicate or state to Mr. Deming you very much preferred getting the salmon in the warehouse over here in an independent warehouse, will you? You may not remember it, but you will not say you did not say it?

A. I have no recollection of it.

(Whereupon the witness was excused and left the stand.)

(Whereupon counsel for plaintiff announced that plaintiff rested, and counsel for the defendants announced the defendants
381 rested.) (Whereupon the jury retire to their jury room.)

Mr. McCord: We now offer a petition for removal to the United States Circuit Court for the Western District of Washington, with bond on removal in the sum of one thousand dollars, with surety, and also the affidavit of E. B. Deming, and ask the clerk, to file these papers. (Argument.) And I ask the court at this time to approve the bond and for a stay of proceedings at this time and to send the record in this cause to the United States Circuit Court for the Western District of Washington.

The Court: The petition will be denied. Your motion for a non-suit was denied on the ground the Court thought there was evidence here that ought to be submitted to the jury, and I do not know of anything that has come up to change the situation in your defense. As an individual and if I was in the jury box I would have some very positive ideas on the matter, but this is a matter for the jury, whether or not this contract was made and what the terms and conditions of it were. I am going to leave the whole matter to the jury. (Exception allowed the defendants.)

Mr. McCord: On behalf of Mr. E. B. Deming I challenge the legal sufficiency of the evidence as against him and ask that the court, and I move the court to grant judgment in favor of the defendant, E. B. Deming, notwithstanding the evidence. In other words I move for judgment at this time upon the ground and for the reason there is no evidence of any kind directly or indirectly tending to connect E. B. Deming in an individual capacity with this controversy, that on the contrary the evidence of the plaintiff itself demonstrates conclusively and beyond any doubt that E. B. Deming was acting in these transactions solely in a representative capacity and not in an individual capacity. There is no evidence of any liability on the part of E. B. Deming to the plaintiff upon the cause of action and upon the agreement stated in the complaint.

382 The Court: The motion is denied. (Exception allowed defendants.)

Mr. McCord: On behalf of the Pacific American Fisheries I now move the court to grant judgment in favor of the defendant, Pacific American Fisheries, notwithstanding the evidence there being no evidence on the part of the plaintiff or any evidence in this case at all in any way connecting the Pacific American Fisheries with the controversy in this action, and there is no evidence at all to go to the jury touching any liability on the part of the Pacific American Fisheries of the claim of the plaintiff as set forth in the

complaint and shown by the evidence. There has been a total failure of proof as to any liability as to the Pacific American Fisheries and the defendant E. B. Deming.

The COURT: The motion is denied. (Exception allowed defendants.)

Mr. McCORD: On behalf of the defendant Deming-Gould Company, I now move the Court for an instructed verdict in favor of Deming-Gould Company for the reason that there has been no evidence introduced in this case tending to establish any liability on the part of the Deming-Gould Company to the Carlisle Packing Company. There has been particularly a total absence of proof as to the delivery of the salmon in controversy by the plaintiff to the defendant, Deming-Gould Company, the contract showing, according to the plaintiff's contention that the delivery of goods should be made prior to February 1, 1908, and delivery was not made at that time or any other time, that there was a breach of contract if made at all on the part of the plaintiff not delivering the goods.

The COURT: The motion will be denied. (Exception allowed defendant.) (Whereupon court took a recess until the hour of 1:30 p. m. of the same day at which time court was opened, all parties being present as heretofore, counsel for the plaintiff and counsel for the defendants conceding the jury present, and the trial proceeded as follows:)

383 *Court's Instructions to Jury.*

The COURT: Gentlemen of the jury, this is an action instituted by the plaintiff against the defendants to recover damages alleged to have been sustained by the plaintiff through a breach of contract for the sale of certain canned fish. The plaintiff alleges in its complaint in substance that during the times mentioned in the complaint it was, and is, a corporation organized and existing under the laws of the state of Washington; that it has paid its state license for the current year, and that it is engaged in the business of catching, packing and curing fish, with its principal place of business at Village Point, in Whatcom County, Washington. That the Deming-Gould Company is a corporation, having its place of business in the city of Chicago, Illinois, and the Pacific American Fisheries is a corporation organized under the Laws of New Jersey, and E. B. Deming is the managing agent of both of said corporations, who are doing business in Whatcom county, Washington. That in 1907 the defendant E. B. Deming, acting for himself and the other defendants, entered into a contract with the plaintiff for the purchase of all the salmon fish packed and to be packed by the plaintiff for the season of 1907. That this agreement was that the defendants would purchase from the plaintiff, and he would sell to the defendants, all of the several grades and varieties of salmon to be packed by the plaintiff during the season of 1907, and that the defendants would pay the plaintiff for each grade of salmon the opening price of each grade, kind and size, and make payments as the same were

shipped and within ten days from the date of delivery, with an allowance of 1½% for cash discount and 5% brokerage; that the deliveries were to be made at some railway terminal point at the expense of the plaintiff, and the defendants were to furnish shipping instructions on or before February 1, 1908, or take whatever portion remained unmoved at that time and pay for the
384 same, and that shipping instructions were to be given to the plaintiff before the time of delivery; that pursuant to this contract the plaintiff delivered to the defendants all of its pack, and defendants took the same and paid for the same, except a certain part therof, which I will mention later, as alleged. That the opening prices which the defendants agreed to pay for such pack were for sockeye talls, $1.65, sockeye flats, $1.80, pink talls, 80 cents, pink flats, 90 cents, pink halves, 60 cents. That the words "talls" and "flats" have reference to each twelve cans of one pound capacity, or a half pound capacity; that each case of salmon contained 4 dozen cans of one pound capacity. That among the pack sold to the defendants by the plaintiff were 10,903 cases of pink flats and the opening value and price of the same was 90 cents per dozen, or $3.60 per case; and at the direction and upon the instruction of the defendants said salmon was delivered between the 4th day of October, 1907, and the 1st day of February, 1908. That the defendants disregarding their contract after the receipt of the property, refused to pay the plaintiff for the said 10,903 cases of pink flats and abandoned this property to the plaintiff, and that the plaintiff in order to save itself was required to take the said salmon and to sell the same on a depreciated market and at a less price than the defendants had agreed to pay, and was required to pay the insurance and warehouse charges incurred against the same. That the said salmon was sold to said defendants at the sum of $36,786.20, and plaintiff was required to retake and to sell the same for a total of $30,001.75 and at a loss of $6,784.45 on said salmon, and it lost on account of the moneys paid out, storage and insurance $1,706.84 and on commissions the sum of $1,530.68, and that it was deprived of the use of its money and was required to pay interest on account of the same amounting to $2,146.16. That during the time
385 mentioned the defendants failed to make payments of certain accrued interest provided for in their contract which have been specifically set out in the complaint. That because of the failure of the defendants to keep and perform their contract the plaintiff has suffered damage in the sum of $12,955.04, with interest on the same since February 1, 1908, and plaintiff prays judgment against each of the defendants in that sum, and for interest from the 1st day of February, 1908.

The defendants have jointly answered the complaint of the plaintiff, and in their answer they admit that the plaintiff is a corporation as alleged; that it has paid its state license for the current year, and that it has engaged in the fish business as alleged. The defendants further admit that the Deming Gould Company is a corporation and that the Pacific American Fisheries is a corporation, and that E. B. Deming is the managing agent of both of said companies, who

are doing business in Whatcom county, as alleged by the plaintiff, and the defendants deny each and every other allegation contained in the plaintiff's complaint, and deny that the plaintiff has suffered damage in the sum of $12,955.04, or any part therof.

The plaintiff's complaint and the answer of the defendants in this case will be presented to you in your jury room, and you can read them and determine from them what is alleged by the plaintiff and what is admitted and what is denied by the defendants; but the pleadings are not to be considered by you as evidence in this case under any circumstances.

Briefly stated, the issues in this case are: Was the contract alleged by the plaintiff and denied by the defendants made? If it was made as alleged by the plaintiff, then did the defendants violate and break the same as alleged? And if they did violate and break the same, was the plaintiff damaged thereby, and if so, in what
386 amount. Whether the contract alleged was made if made, whether the same was violated by the defendants, and whether if the same was made and was violated the plaintiff suffered damage thereby; and if it suffered damage, the amount of the same, are questions of fact to be determined by you from all the evidence in this case.

You are instructed that the burden of proof in this case is upon the plaintiff to prove all the material allegations of the complaint which are denied by the defendants, by a fair preponderance of the evidence.

In case you should find that the evidence upon the facts alleged in the complaint and denied in the answer are equally balanced, then it would be your duty to return a verdict in favor of the defendants.

Number 3. You are instructed that before you can find for the plaintiff and against the defendants or any of them in this case, you must find by a preponderance of the evidence that a contract, as alleged, was entered into between the plaintiff and the defendants, or between the plaintiff and some one or more of the defendants; and you are instructed that before there can be a contract between two or more parties the minds of the parties must meet and agree upon all the terms and conditions of the contract.

It is not necessary, however, that all of the known usages and customs relating to the business or subject matter of the contract, if any such exist, should have been the subject of consideration by the parties to the contract to be a part of the same. Where a contract is entered into, the parties to it are presumed to have contracted with reference to the known usages and customs which enter into and govern the business or subject-matter to which the contract relates, if there are any such usages and customs, unless such presumption is overcome or rebutted by the contract itself, and if the
387 contract contains nothing relating to such usages and customs, or the tenor of the same does not rebut the presumption that it was made with reference to such usages and customs, then such usages and customs relating to and applicable to the subject-matter of the contract as are commonly known to exist enter into and form a part of the contract although not mentioned or alluded to in the contract.

A usage of trade or custom to be binding as such, however, must not contravene any law, and it must be certain reasonable, uniform, and generally known and established among those who are engaged in the business to which it relates, and it must be so well settled and uniformly acted upon at the place where it is claimed to exist as to raise a fair presumption that it was known to the parties to the contract, and that they contracted with reference to and in conformity with it.

Number 4. If you find from a preponderance of the evidence that after the time at which it is alleged by the plaintiff the contract was made some part of the fish so packed by the plaintiff for said year was delivered into a warehouse by the plaintiff and that the plaintiff caused warehouse receipts for such fish to be issued in its name and delivered to a bank as security for money then owing by the plaintiff to the bank, and that the plaintiff had insurance written insuring such fish against loss of any kind for the protection of such bank, then the securing and placing of such warehouse certificates and the taking out of such insurance, or either of the same, would be a circumstance to be considered by you in connection with all the other facts and circumstances in the case in determining whether or not the contract alleged by the plaintiff was made.

Number 5. You are further instructed that if you find in this case from a preponderance of the evidence that a contract was
388 made as alleged by plaintiff, and that the plaintiff caused warehouse receipts for the salmon alleged, or any of the same, to be issued in its name, and that such warehouse receipts were delivered to the bank as security for money then owing by the plaintiff to the bank, and that the plaintiff had insurance on the fish as mentioned for the protection of the bank, or that the plaintiff did or caused either of such things to be done, such facts would not deprive the plaintiff of its right to recover in this action if the defendants, or such of them as may have entered into the contract alleged, had control of the fish in such warehouse, or had knowledge of the use of such warehouse certificates in the bank, and had the privilege of withdrawing such fish from such warehouse by paying the contract price therefor and taking up such warehouse certificates.

Number 6. You are instructed that before you can find for the plaintiff in this case you must find by a preponderance of the evidence that a contract as alleged was entered into between the plaintiff and defendants, or some one or more of them; that the defendant or defendants who entered into the contract violated the same, and that the plaintiff was damaged as the result of such violation. In such case, if you find it to be the case, the plaintiff would be entitled to recover of the party or parties to such contract such damages, if any, as naturally and directly flowed or resulted from the breach of the contract complained of as the proximate effect of such breach.

In a case of this kind if the contract be established and a breach thereof by the party defendant be shown by a preponderance of the evidence, the other party to the contract who is wronged by such breach is entitled to recover such damages, if any, as arise in the

natural course of things from the breach itself, and such as may be reasonably supposed to have been contemplated or foreseen
:389 by the parties to the contract when they made it, as the probable result of the breach. Damages in such case must be certain both in their nature and in respect to the cause from which they proceed.

Remote damages are not connected directly with the breach of the contract, and such as cannot be said to have entered into the contemplation of the parties at the time the contract was made, or contingent or speculative damages, cannot be recovered, nor can any damages be recovered when any efficient agency intervened between the breach complained of and the injury alleged to have resulted from the breach.

Whether the contract alleged was made? If so, whether a breach of the same was committed as alleged? If such breach was committed, whether any damages resulted as the natural and proximate consequence of such breach? And if so, the amount of such damage, are questions of fact which you must determine from all the evidence in this case.

Number 7. If you believe from a preponderance of the evidence that the defendants, or any of them, made a contract with the plaintiff whereby the defendants, or any of them, were to purchase all the salmon of every grade which should be packed by the plaintiff for and during the year 1907, and pay for the same at the rates and prices per case that should be fixed and quoted as the opening prices of the respective grades for the 1907 pack, for the general market, less 1½% and 5% discount, and if you should further find that the plaintiff delivered any part of its pack of such fish to defendants pursuant to such contract, then the defendants became bound to accept and pay for all the fish packed by the plaintiff for and during said year at such opening prices less 1½% and 5% discount
:390 from such opening prices, if tendered by the plaintiff to the defendants, or any of them, in accordance with the terms of the contract, and to pay plaintiff for such entire pack of that year at such time or times as you find by a fair preponderance of the evidence was agreed upon for the payment of all of the same.

Number 8. If you find from a preponderance of the evidence that the opening price of salmon for the pack of 1907 was the market price at such time, that is, about the time of the completion of the pack, and if you further find that on or about the 26th day of August, 1907, salmon of the same kind and quality as that in question was being sold in the open market for less than 90 cents per dozen for pink flat salmon, then I instruct you that in reaching a conclusion as to what was the opening price of salmon for the pack of 1907, any evidence tending to show that sales of salmon of the grade and character in controversy in this case were then made in the open market and the prices at which same was sold, would be a circumstance to be considered by you in connection with all the other facts and circumstances in the case in determining what was the opening price of salmon of the kind in question for the 1907 pack.

Number 9. If you believe from a preponderance of the evidence

that the defendants, or any of them, agreed with the plaintiff to purchase from the plaintiff all of the fish packed by it in 1907, and to pay for the same at the opening prices of the respective grades and kinds thereof less discounts of 11½% and 5%; and you further find by a preponderance of the evidence that part of the fish so packed was received by the defendants, or such of them as entered into the contract, and that a part was not received nor paid for, as has been agreed upon, but was refused, then I instruct you that in such case plaintiff would have a right to resell the part not so received
391 at the market price thereof, and to sue for and recover from the defendants, or such of them as may have entered into the contract, the difference between what would have been due the plaintiff for such fish under the contract for the purchase of the same, and any lesser sum obtained by the plaintiff on the resale thereof so made.

Number 10. If you find from the evidence in this case that the defendants agreed to take all of the unsold salmon of the 1907 pack belonging to the plaintiff on February 1, 1908, at the opening price of salmon for such 1907 pack, but refused to do so, then I instruct you that the plaintiff had a choice of remedies as follows:

First. The plaintiff could store the salmon and hold the same subject to defendants' orders, and sue for the contract price, or

Second. The plaintiff could sell the salmon after notice to the defendants and recover the difference between the price received and the contract price, using due diligence to obtain the highest available price, or,

Third. The plaintiff could retain the salmon as its owner and recover the difference between the market value of the same at the time and place of delivery, and the contract price, if the market price was less than the contract price.

But the plaintiff could not avail itself of all three of these remedies, and if you find from the evidence that the plaintiff in the first instance adopted the third remedy and elected to retain the property as its own, and held the same from February 1, 1908, to July, 1909, and refused to sell the same upon the market between such dates, I instruct you that such action on the part of the plaintiff would estop the plaintiff from thereafter electing to avail itself of either the first or second remedy just described and defined to you; and if you find from a preponderance of the evidence that such action on the
392 part of the plaintiff is not selling said salmon on the market between February 1, 1908, and July 1, 1909, amounted to an election of choice on its part to avail itself of the remedy of taking over the goods as its own, then I instruct you that this action is not predicated upon such theory and the plaintiff could not in such case recover against the defendant on account of the pink salmon.

Number 11. If you find from a preponderance of the evidence in this case that the salmon in question was not delivered to the defendants by the plaintiff, but remained in the possession and under the control of the plaintiff at all times both prior and subsequent to February 1, 1908, then I instruct you that it was the duty of the plaintiff in case you find that the defendants breached their contract, to sell the salmon so remaining in its hands at the market value and price

thereof at the place of delivery within a reasonable time thereafter, and that it was the duty of the plaintiff to use all necessary diligence and care in accepting the best available price for such unsold salmon. The law imposed this duty upon the plaintiff in order that the damage growing out of the alleged breach of the contract might be reduced as much as possible, and if you find from the evidence in this case that the plaintiff on or about the 5th day of February, 1908, or at any time after the breach of the contract on the part of the defendants, if it was breached, was unconditionally offered the market price for the salmon on hand and not sold, that it was the duty of the plaintiff to accept said offer and to sell said salmon, and if such offer was made by a bona fide purchaser to the plaintiff for said salmon, and the plaintiff refused to accept said offer, then I instruct you that the limit of plaintiff's recovery in this action on the item of the pink salmon would in such case be the difference between the market price so offered and the alleged contract price of the same,
393 together with interest on such difference computed at the rate of 6% per annum from the time of such breach to the time of such refusal, if any time elapsed between the time of such breach and such refusal to sell the salmon. And in such case, if you find it to be the case, by a preponderance of the evidence, the plaintiff could not recover any sum whatever on account of any expenses, discounts, commissions, exchange, insurance, storage, or other charges, or interest connected with the handling of the salmon, subsequent to the time of such refusal to sell the same.

Number 12. If you believe by a preponderance of the evidence that the plaintiff contracted with the defendants, or any of them, to sell its 1907 pack of fish to the defendants, or any of them, to be paid for within ten days after the respective deliveries of parcels thereof made prior to February 1, 1908, and any part thereof remaining on said last named date should then be received by the defendants, or such of them as may have entered into the contract, and then paid for in full, then the defendants became bound to pay to the plaintiff within ten days after such respective deliveries were made for each of the same so made, and to pay for the remaining fish, if any, on the 1st day of February 1908, and if payments were not so made, plaintiff in such case would be entitled to interest on each deferred payment at the rate of 6% per annum from and after the date the same became due, and the plaintiff in such case would be entitled to recover such interest in this action. But, if you should find from a preponderance of the evidence that the defendants agreed to take a portion of said salmon prior to February 1, 1908, in one or more shipments, and that it did take a portion thereof and you should further find that the defendants, or defendant, purchasing such fish did not agree to pay for the same within ten days after the delivery of the same, or at any specified time, then I instruct
394 you that the plaintiff in such case would not be entitled to recover any interest on account of such deliveries until after the same had been made, and demand for the price thereof made by the plaintiff of the defendants, or defendant, purchasing such fish, but after a demand so made the plaintiff would be entitled to in-

terest on the sum or sums due, and demand for which had been made, at the rate of 6% per annum from the time of such demand.

Number 13. If you believe from a preponderance of the evidence that plaintiff sold to the defendants, or any of them, the 10,903 cases of pink salmon alleged, or any of the same, at the opening prices of the 1907 season less a discount of 1½ and 5% thereon, and a time for the payment of such price was fixed and agreed upon by the parties, and you further find that defendants refused to accept and pay for such fish at the price so agreed and fixed upon, and you further find that the plaintiff was required to resell such fish and did in good faith resell the same at the fair market price thereof as the market then existed; that plaintiff exercised reasonable diligence to sell such fish to the best advantage, and that the price realized was less than the original contract price, then and in such case you are instructed that the plaintiff would be entitled to recover from the defendants the net difference between what the plaintiff would have received from the defendants under the contract and what it did actually receive from the sales thereof, together with interest on the money which defendants, or defendant, as the case may be, should have paid plaintiff for its fish under the contract, when computed thereon at the rate of 6% per annum from the date when the money should have been so paid to this date, subject to credits on account of the resales of the fish made by the plaintiff, applied at such time or times as you should find from the evidence they should be applied.

In other words, in such case you would take the contract price
395 of the fish as a basis, compute the interest thereon at the rate of 6% per annum from the day on which the same became due to the day on which the first credit by fish resold by the plaintiff should be given, deduct the amount of this credit from the original sum, take the balance remaining, compute interest thereon from the date of such credit at the same rate until the time when the price of the next resale of fish should be credited, deduct such credit and so continue this method of computation until the time all of the said fish were accounted for by plaintiff. The remaining balance and all of the items of interest so computed and found added together would in such case represent the difference between the contract price of such fish and the price received by the plaintiff for the same on the resale thereof together with the interest.

And in such case, if you find it to be the case, if you should find from a preponderance of the evidence that the plaintiff was required to pay and expend any sum for storage on the fish in controversy, or any sum for insurance on the fish not received and taken under the contract, which were incurred subsequently to the breach of the contract by defendant, and while the plaintiff was diligently and in good faith disposing of such fish on the market, and that such insurance or storage expenses were such as may be reasonably supposed to have been contemplated by the parties to the contract when they made it as the probable results of a breach of the contract by the defendants, or defendant as the case may be, then plaintiff would also be entitled to recover in this case whatever sums, if any, were paid by

it with interest on the same computed at the rate of 6% per annum from the time such storage or insurance charges were so paid.

Number 14. If you find by a preponderance of the evidence that a contract was made, and that the defendant, or defendants, broke the same as alleged, and that the plaintiff suffered damage
396 thereby, for which it is entitled to recover under these instructions, then I suggest that you adopt the following form of computation in arriving at the sum which the plaintiff should recover. First, find from the evidence the number of cases or dozens of pink salmon the defendant refused to accept from the plaintiff and the net contract price agreed and fixed upon for the same. With this data you would compute the contract price or value of such salmon. Then you would find the net price at which plaintiff resold the same fish, deduct the net price received on the resale of the fish from the net contract price of the same salmon; to the difference thus obtained add such charges, if any, under these instructions, plaintiff may be entitled to charge on the resale of the fish and the interest items, if any, and the amount thus obtained would be the amount of the plaintiff's recovery.

Number 15. You will determine this case upon the evidence which the court has admitted before you, by a fair preponderance of the same. What is meant by a preponderance of the evidence does not necessarily mean the greater number of witnesses testifying to any particular fact, but it is the testimony which has the greater convincing force and power to your minds. The testimony of one witness may outweigh the testimony of several witnesses. In determining the weight or the credit you will attach to the testimony of the witnesses you will take into consideration the demeanor of each upon the witness stand, his opportunity of knowledge concerning the things about which he has testified, his interest or lack of interest in the result of the case, and the reasonableness of his story. From all these you will determine where the preponderance lies.

You are the sole judges of the facts in this case, and you must determine from the evidence what the facts are. If the Court has referred to any fact in the case either in the admission of the
397 evidence or in these instructions it has not been done to indicate to you any opinion the court may have of the facts, but it has been done for the purpose of illustrating some proposition of law which may be involved with the facts.

You are the sole judges of the credibility of the witnesses who have testified in this case, and you must determine the weight or the credit to be attached to the testimony of each of the witnesses. It is your duty to harmonize the testimony of the witnesses who have testified before you if you can do so in theory consistent with the truth, but if you find that any witness has wilfully testified falsely concerning any material fact in the case, you have the right to disregard his entire testimony except so far as it may be corroborated by other testimony in the case.

You are instructed to disregard anything that may have been said by counsel during the course of the trial, or that may be said in the arguments of counsel where such statement is not warranted by the

evidence, and you will determine this case solely upon the evidence and upon the law as given you by the court.

Number 16. Ten of your number must agree in order to find a verdict. When you have retired to your jury room you will elect one of your number foreman. When ten of your number have agreed upon a verdict you will cause it to be signed by your foreman and announce the agreement to the court.

If you find for the plaintiffs and against the defendants, the form of your verdict will be as follows: giving court, style of cause, number and verdict: We, the jury in the above entitled cause, duly empaneled and sworn, do find for the plaintiff and against the defendants, and assess the plaintiff's damages in the sum of blank dollars. Foreman.

In such case you will fill in the amount so found and cause
398 your foreman to sign the verdit.

Number 17. If you find for the plaintiff and against one of the defendants and for the other two defendants; or, for the plaintiff and against two of the defendants, and for the other defendant, then the following will be the form of your verdict: giving court, style of cause, and number, verdict: We, the jury in the above entitled cause, duly empaneled and sworn do find for the plaintiff and against the defendant—blank—and assess the plaintiff's damages in the sum of blank-dollars, and we do further find for the defendant-blank. Foreman.

In such case you will fill in the name or names against whom you find and the amount found, and you will fill in the name or names of the defendants in whose favor you find, and cause your foreman to sign the verdict.

Number 18. If you find for all of the defendants, the following will be the form of your verdict, giving court, style of cause and number, verdict: We, the jury in the above entitled cause, duly empaneled and sworn, do find for the defendants. Blank foreman.

If this be your verdict, you will cause your foreman to sign the same.

(Whereupon counsel for plaintiff and counsel for defendants made final arguments to the jury, after which the jury retired to consider their verdict, and the following proceedings were had:)

Mr. McCoun: The defendants and each of them except to the third instruction given by the Court for the reason that the same is not the proper statement of the law and is not the proper exposition of the law applicable to the facts and testimony and issues in this cause. The defendants, and each of them, except to the 4th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case,
399 and is prejudicial to the rights of the defendants and each of them.

The defendants, and each of them, except to the 5th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 6th instruction

for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 7th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 8th instruction, for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 9th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 10th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

100 The defendants, and each of them, except to the 11th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 12th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 13th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants, and each of them, except to the 14th instruction for the reason that the same is not the proper statement of the law applicable to the facts and issues involved in this case, and is prejudicial to the rights of the defendants, and each of them.

The defendants except to the failure and refusal of the court to give the first instruction requested by the defendants, the same being applicable to the evidence and within the issues and being a correct exposition of the law of this case.

The defendants except to the failure and refusal of the court to give the second instruction requested by the defendants, the same being applicable to the evidence and within the issues and being a correct exposition of the law of this case.

The defendants except to the failure and refusal of the court to give the third instruction requested by the defendants, the same being applicable to the evidence and within the issues and

101 being a correct exposition of the law of this case.

The defendants except to the failure and refusal of the Court to give the fourth instruction requested by the defendants, the

same being applicable to the evidence and within the issues and being a correct exposition of the law of this case.

The defendants, and each of them, except to the refusal of the Court to give the fifth instruction as requested by the defendants and in the form requested, and except to the modification of the same as given by the court.

The defendants except to the refusal of the court to give the 6th instruction requested by the defendants, in the form requested and except to the modification of the same as given by the Court and except to the refusal of the Court to give the 7th instruction as requested by the defendants, the same being pertinent to the issues and containing a correct statement of the law applicable to the facts and issues in said cause.

The defendants except to the refusal of the Court to give the 8th instruction requested by the defendants as requested, the same being pertinent to the issues and containing a correct statement of the law applicable to the facts and issues in said cause.

The defendants except to the refusal of the court to give the 9th instruction as requested by defendants, the same being pertinent to the issues and containing a correct statement of the law applicable to the facts and issues in said cause.

The defendants except to the refusal of the Court to give the 11th instruction as requested by the defendants, the same being pertinent to the issues and containing a correct statement of the law applicable to the facts and issues in said cause.

Mr. BRUCE: The plaintiff will enter an exception to instruction number 8, for the reason that it is not applicable to the facts developed in this case, and was calculated to lead the jury to the
402 consideration of facts not in evidence.

The plaintiff enters an exception to instruction 10, for the reason it submits to the consideration of the jury a question of law, and is a misstatement without modification of the legal rights of the parties.

The plaintiff enters an exception to instruction number 16 or that portion of number 16, in submitting more than two forms of verdict to the jury, it being the contention of the plaintiff that the defendants have united in their answer and if the plaintiff is entitled to a recovery of judgment it is entitled to recover as against all of the said defendants.

Finis.

403 STATE OF WASHINGTON,
*County of Whatcom, ss:*

I, Ed E. Hardin, one of the judges of the Superior Court of the State of Washington in and for the County of Whatcom, and the judge before whom the foregoing cause was tried, do hereby certify that the matters and proceedings contained in the foregoing statement of facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and I do further certify that the same contains all the material facts, matters

and proceedings heretofore occurring in said cause and not already made a part of the record therein.

I do further certify that the foregoing statement of facts contains all the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony and all motions, offers to prove and admissions upon the trial of said cause; and that the plaintiff's exhibits from 16 to 29, inclusive, and 31, 32 and 32 supplemental, and from 33 to 38, inclusive, and the defendants' exhibits A, B, C, D, E, F and G, as hereto attached, are all the exhibits introduced upon the trial of said cause, counsel for the plaintiff and counsel for the defendants concurring.

Done in open court this 1st day of July, 1910.

ED E. HARDIN,

*Judge of the Superior Court of the State of Washington in and for the County of Whatcom, Who Tried the Foregoing Cause.*

404 No. 9208. Department One.

Filed Mar. 17th, 1911.

CARLISLE PACKING COMPANY, Respondent,

v.

E. B. DEMING, DEMING-GOULD COMPANY, and PACIFIC AMERICAN FISHERIES, Appellants.

This action was commenced by the plaintiff to recover the sum of $12,955, upon a claim growing out of an alleged breach of contract for the purchase of certain canned salmon of the pack of 1907. The essential allegations of the complaint are as follows:

"That on or about the — day of ——, 1907, the defendant E. B. Deming, acting for himself and his co-defendants, entered into a contract with this plaintiff for the purchase of all of the salmon fish packed and to be packed by this plaintiff for the season of 1907; that said agreement was that the said defendants would purchase from this plaintiff, who would sell to said defendants, all of the several grades and varieties of salmon to be packed by plaintiff during the season of 1907, and pay plaintiff for each grade of salmon the 'opening price' thereof, of each grade, kind and size, and make payments as the same were shipped and within ten days from the date of delivery, with an allowance of 1½ per cent. for cash discount and 5 per cent. brokerage. Deliveries were to be made to some railway terminal point at the expense of this plaintiff, and the said defendants were to furnish shipping instructions on or before February 1st, 1908, or take whatever portion remained unmoved at that time, and pay for the same, warehousing it if necessary, and all expenses of such disposition, and shipping instructions were to be given to this plaintiff at and before the time for delivery. That pursuant to said

contract this plaintiff delivered to the said defendants all of its pack and the said defendants took said pack and paid for same, except as hereinafter set forth; that the 'opening prices' and sum which the defendants agreed to pay for such pack were as follows: Sockeye talls, $1.65; sockeye flats, $1.80; pink talls, 80c.; pink flats, 90c.; pink halves, 60c.; that the words 'talls' and 'flats' have reference to each twelve cans of one pound capacity or a half pound capacity; that each case of salmon contained four dozen cans or forty-eight cans in all, of one pound capacity; that amongst others of the pack sold to the defendants by said plaintiff were 10,903 pink flats and the opening value and price of which was 90c. per dozen, or $3.60 per case and at the direction and upon the instruction of the said defendants said salmon were delivered between the 1th day of October, 1907, and January 1st, 1908, and the price so agreed to be paid became due and payable to plaintiff; that said defendants disregarding their contract aforesaid, after the receipt of the property as aforesaid refused to pay this plaintiff for the said 10,903 cases of pink flats and abandoned the said property to this plaintiff, after making it subject to charges for warehousing and insurance placed by the said defendants, and this plaintiff, in order to save itself, was required to take said salmon and to sell the same upon a depreciated market and at a less price than the defendants had agreed to pay, and was required to pay the insurance and warehouse charges incurred against said property; that said property was sold to said defendants at the sum of $36,786.20, and plaintiff was required to retake
405 and sell the same for a total sum of $30,001.75 whereby it lost $6,784.45 on said salmon, and it lost on account of moneys paid out, storage and insurance $1,706.84 and on commissions the sum of $1,530.68, and it was deprived of the use of its money and was required to pay interest on account thereof amounting to $2,146.16; that because of the acts and doings of the said defendants and their failure to keep and perform their contract aforesaid this plaintiff has suffered loss and damage in the sum of $12,955.04, with interest thereon since January 1st, 1908."

The defendants joined in an answer denying all of the allegations of the complaint. The cause was tried to a jury and a verdict was rendered against all of the defendants for $12,700, and on June 13, 1910, a judgment was entered in favor of the plaintiff for that sum. This appeal is prosecuted by defendants from that judgment.

It was contended by the plaintiff at the trial that, in the spring of 1907, the defendants agreed to purchase all of the canned salmon to be packed by the plaintiff during the season of 1907, at the "opening price" for such salmon for that season, from which price the defendants were to be allowed to deduct five per cent. for commissions and a discount of one and one-half per cent., and that the salmon which was unsold by the defendants on February 1, 1908, should be taken over by the defendants and paid for at the opening price, less the commission and discount above stated; that defendants purchased all of plaintiff's salmon pack of that season excepting 10,920 cases of four dozen cans each; that this salmon, known as "pink flats," was abandoned to the plaintiff after it had been subject to

warehouse charges and insurance created by defendants, and that on February 5, 1908, the defendants refused to pay for or take the said salmon and that plaintiff, in order to save itself, was required to pay the charges against the salmon and to sell it upon a depreciated market at less than the defendants had agreed to pay. The defendant Deming denied that any such contract was made, but testified that he made an agreement with the plaintiff for handling the salmon of the plaintiff for the year 1907, by which agreement the Deming-Gould Company was to sell the salmon upon a purely brokerage basis; and that there was no agreement to take over the salmon for that season, but that it was agreed that upon the said date the Deming-Gould Company would take over at the then market price all of such salmon remaining unsold, and that on February
406 5, 1908, Mr. Deming offered to take over all the salmon in dispute at the market price on that day, which was eighty cents per dozen cans. It is conceded in the case that the "opening price" of the class of salmon in dispute was ninety cents per dozen, and that Mr. Deming took over and paid for all of plaintiff's pack for that season except the part in dispute, and paid for the same at the opening price. It is also conceded that Mr. Deming was the managing agent at Bellingham of the Deming-Gould Company of Chicago, and the vice-president of the Pacific American Fisheries, and had authority to make any kind of contracts for these companies; that these companies were large dealers in canned salmon, and that Mr. Deming, arbitrarily fixed the opening prices of such salmon. Other facts necessary to an understanding of the points discussed will be stated in the consideration thereof.

The appellants argue that the court erred in refusing to discharge the jury and try the case as an equity case for an accounting. In the progress of the case it appeared that the salmon in dispute had been stored in a warehouse controlled by the defendant Deming, and that upon Mr. Deming's refusal to take the fish and to pay the opening price—ninety cents per dozen, the plaintiff, through its agent, notified Mr. Deming that the plaintiff would offer the fish for sale upon the market and hold Mr. Deming upon his contract for the difference between the contract price and the net price at which the fish might be sold; that therafter the fish was placed upon the market and sold in small lots to numerous purchasers; that upon each sale it was necessary to determine the selling price, freight charges, insurance, cartage, commissions, and other items of expense in order to arrive at the net amount received by the respondent; that the plaintiff thereby became trustee for the defendants in regard to the sales of the propeprty, and that an accounting became necessary. This position might have been correct if an accounting had been the only issue between the parties, but as we view the case, this accounting, if it may be termed such, was only an incidental matter. The main and real issue in the case was whether there was a contract and if so, what were the terms of it. This issue was made by the pleadings and stoutly maintained from the beginning of the case to
407 the end. It is true that by the evidence it was conceded that a contract had been entered into, but the terms of this con-

tract were never conceded. For that reason the case was one for the jury. There was, finally, no substantial dispute that the goods were sold, or that the statement of receipts and disbursements on account of these sales made by the respondent was correct. The right of the plaintiff to recover at all depended solely upon the terms of the contract. The action was not one for an accounting, but was for a breach of contract. The respondent had sold its own goods for the best prices obtainable, and its measure of damage was the difference between the selling price and the contract price, provided the contract and breach of it were established. There was no such trust or fiduciary relation existing as would make the case exclusively one for an accounting, and the cases of Maitland v. Purdy, 49 Wash. 575, and Goupille v. Chaput, 43 Wash. 702, and cases of that character, are therefore not in point here. Cases of this character are usually tried to a jury as a law case. See Hayes v. City of Nashville, 80 Fed. 641. The court did not err in refusing to discharge the jury.

At the close of the plaintiff's evidence, counsel for defendants moved for a nonsuit as to the defendant Deming and as to the Pacific American Fisheries, upon the ground that there was no evidence to connect these two defendants with the contract sued upon; and again, at the close of all the evidence in the case, counsel moved for a directed verdict as to the defendant Deming. These motions were denied, and each of these rulings of the court is assigned as error. These errors are argued separately in the brief, but they all depend upon substantially the same state of facts. It was conceded that Mr. Deming was the vice-president of the Pacific American Fisheries and managing agent of the Deming-Gould Company, and had authority to bind these companies by such contracts. Mr. Wright, who was the managing agent for plaintiff, testified that while nothing was said about the matter except that Mr. Deming was to give him orders for fish pro rata with the Pacific American Fisheries, he understood that the contract was to be made with the Deming-Gould Company, but that he was dealing with Mr. Deming personally, and relied upon him. At the time the contract was made, Mr. Deming agred to reduce the same to writing, but this was never done. All of the fish which was delivered under the contract was delivered and shipped upon Mr. Deming's order. Mr. Deming was in full control of the business of the other two defendants, and their responsible head. It was within his hands at the time the contract was made to make the contract definite in regard to who were the responsible parties thereto, by simply reducing the same to writing as he had agreed to do. At the time the action was begun, the plaintiff, not knowing which one of the defendants was responsible, made all three of them defendants. When the answer was filed, all of them joined therein and made a joint answer containing general denials only. If the defendant Deming desired to deny that he made the contract for himself personally or for the Pacific American Fisheries, that fact should have been set up in the answer. When all joined in the answer, they thereby took issue upon the facts jointly, and if the contract alleged was proved, all were necessarily bound jointly.

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1 Ency. Pl. & Pr., p. 861.

Ex parte Lowman & Hanford etc. Co., 2 Wash. 427.

The record shows that Deming-Gould Company and Pacific American Fisheries were foreign corporations, and that Mr. Deming was their manager and owned or controlled a majority of the stock of these corporations. Mr. Deming was a resident of Bellingham where the contract was made. He was engaged in other business beside the business of the corporations. It will not do to say that a person so situated may make a contract and leave it indefinite for whom he makes the contract when he has agreed to reduce it to writing and thereby make it definite, and when a liability arises then be heard to say that the contract was made for some other party. We are of the opinion, for these reasons, that the court properly denied the motions to dismiss.

At the close of all evidence in the case the defendants Deming-Gould Company and Pacific American Fisheries filed a petition and bond for the removal of the case to the United States circuit
409 court, upon the ground of diverse citizenship of the parties. It was contended then, and it is argued now, that defendant Deming, being a resident, was not made a party in good faith, but was made such party defendant solely for the purpose of depriving the United States circuit court of jurisdiction over the subject matter of the action. We have held above that defendant Deming was a proper party. That ruling disposes of this question.

Appellants argue that the court erred in admitting in evidence certain books of account. It is claimed that these books were not books of original entry; that they were not complete, and were not kept by a competent bookkeeper. The court did not allow the books themselves to be admitted in evidence, but permitted a statement to be drawn therefrom, which statement consisted of the items of sales of the fish in controversy. This statement was received for the purpose of showing the sales of fish and the net proceeds thereof. We are satisfied that the books themselves might have been properly admitted under the rule stated in Cascade Lumber Company v. Aetna Indemnity Company, 56 Wash. 503. In effect they were admitted, because the statement received was a copy made from the books. This statement, however, was admissible irrespective of the fact that it was a copy of the books, because Mr. Wright, the manager of the plaintiff company, testified that he had personal knowledge of all the items of the statement, and that the items were correct. There is therefore no merit in this assignment.

Appellants argue that the court erred in refusing a nonsuit as to the Deming-Gould Company, for the reason that the complaint failed to allege notice of an intention to re-sell the fish and to hold the defendants for the difference between the contract price and the proceeds of the re-sale. This motion was not made until after the fact had been proved, so that the complaint will now be treated as amended in that respect. The witness Wright upon this question testified that, on February 5, 1908, when Mr. Deming first denied the terms of the contract, he notified Mr. Deming that the fish would be offered for sale, and that he would sue him for the loss. The evi-
dence also shows that Mr. Wright proceeded diligently to
410 make a re-sale, but was unable to do so until late that year, and that in July he also notified the Deming-Gould Company

in writing to the same effect. As soon thereafter as purchasers could be obtained, the goods were sold at a loss. There is substantially no dispute in the record upon these facts. The record is also clear to the effect that the prices obtained for the fish sold were the highest which could have been obtained for that character of fish, and that the expenses of the sale were reasonable, and the verdict was not excessive.

The court gave instructions to the effect that, if the jury found that the contract was made and defendants refused to accept the goods, plaintiff would have a right to re-sell and recover the difference between the contract price and the net selling price; that the plaintiff might deduct from the gross selling price defendants' reasonable expenses, such as insurance, storage, cartage, freight and commissions paid brokers. It is argued that these instructions did not state the law, because they omitted the question of notice. But as we have seen above, the question of notice was not disputed, and the court no doubt assumed that such was an established fact with which the jury were not concerned; which we think was correct. And it is clear under the evidence that the expenses named were necessary and reasonable, and that the net price received was all that the defendants were entitled to be credited with upon the contract price which they had agreed to pay. We think that the instructions given fully cover the law of the case, and that there was no error therein.

Finding no error the judgment is affirmed.

MOUNT, *J.*

We concur:

DUNBAR, *J.*
PARKER, *J.*
FULLERTON, *J.*

411 In the Supreme Court of the State of Washington.

FRIDAY, *October* 13, 1911.

No. 9208.

In the Matter of the Petition for Rehearing in the Case CARLISLE PACKING COMPANY

vs.

E. B. DEMING, DEMING-GOULD COMPANY, PACIFIC AMERICAN FISHERIES.

*Order.*

The petition for rehearing in the above entitled cause having been heretofore submitted to the court and the court having fully considered the same and being fully advised in the premises, it is ordered that the said petition be and the same is hereby denied.

412 In the Supreme Court of the State of Washington.

MONDAY, *October* 16, 1911.

No. 9208.

CARLISLE PACKING COMPANY, Respondent,
vs.
E. B. DEMING, DEMING-GOULD COMPANY, and PACIFIC AMERICAN FISHERIES, Appellants.

*Judgment.*

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Whatcom county, and upon the argument of counsel the court having fully considered the same and being fully advised in the premises, it is now on this 16th day of October, A. D. 1911, on motion of Fairchild & Bruce, of counsel for respondent, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs; the petition for rehearing — denied and that the said Carlisle Packing Company have and recover of and from the said E. B. Deming, Deming-Gould Company, Pacific American Fisheries, and from D. M. Brosseau and R. A. Welch, sureties, the costs of this action taxed and allowed at Seventy-two & 75/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

413 In the Supreme Court of the State of Washington.

No. 9208.

CARLISLE PACKING COMPANY, Plaintiff and Respondent,
v.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, PACIFIC AMERICAN FISHERIES, a Corporation, Defendants and Appellants.

*Petition for Writ of Error.*

To the Honorable the Chief Justice of the Supreme Court of the State of Washington:

The petition of the Deming-Gould Company, Pacific American Fisheries, and E. B. Deming, defendants and appellants in the above entitled action, respectfully shows:

That your petitioners are the defendants and appellants in the above entitled action, and that final judgment therein was rendered and filed in this court on the 17th day of March, 1911, and entered on October 13, 1911, in and by which judgment the judgment of

the superior court of the state of Washington for Whatcom county, rendering judgment in favor of plaintiff and respondent against defendants and appellants, for the sum of $12,700, was affirmed; that said final judgment rendered by this court in said action was greatly to the prejudice and injury of your petitioners, which said judgment and the proceedings leading thereto were erroneous in many particulars.

That in said action the benefit and privilege of section 2 of the act of March 3, 1875, chapter 137, as amended by the act of March 3, 1887, and the act of August 13, 1888, of the Congress of the United States, 25 Statutes at Large, 434, and that said privilege under said statute was denied by this court and by the superior court of the state of Washington for Whatcom county; and that the effect of the decision and judgment of this court and the judgment of the said superior court of the state of Washington for
414 Whatcom county was a denial to these petitioners of the privilege claimed by them under said statute.

That at the time of the commencement of said action in the superior court of the state of Washington for Whatcom county, these petitioners were all named as parties defendant, and were alleged to have made a certain contract with the plaintiff and respondent.

That the Pacific American Fisheries is a corporation organized under the laws of the state of Maine, and a resident and citizen of the state of Maine.

That Deming-Gould Company is a corporation organized under the laws of the state of Illinois and a resident and citizen of Chicago, Illinois.

That E. B. Deming is a resident and citizen of the state of Washington.

That at the time of the commencement of this action in the said superior court, it did not appear that the action was fraudulently brought for the purpose of depriving the United States Circuit Court of jurisdiction of said cause, and the petitioners' right to have said cause removed to the federal court of the United States for the Western District of Washington, did not appear upon the face of the record.

That after the testimony was introduced and it appeared conclusively and without contradiction from said testimony that the defendant E. B. Deming had no connection with said contract other than as an agent for the Deming-Gould Company, and as the president of the Pacific American Fisheries; that the testimony without contradiction disclosed that E. B. Deming was in no way a party to said contract upon which this action is predicated, and that he was not a proper party to the action and had been improperly joined as a defendant; that at the conclusion of the testimony in the trial of said cause these petitioners filed a petition in the superior court of the state of Washington for Whatcom county, asking that said cause be removed to the United States Circuit Court for the Western District of Washington upon the ground of diversity of citizenship, and upon the ground that E. B. Deming was not a

proper or necessary party to said action, and that he was
415 fraudulently joined as a party defendant to prevent the removal of this action from the state court where the action was then pending, namely, the superior court of the state of Washington for Whatcom county, to the said United States Circuit Court for the District of Washington.

That said petition was proper in form and contained the necessary steps required by the United States statutes for the removal of the cause from the state court to the federal court. That said petitioner was denied. To which petitioners duly excepted.

That on the trial of said cause in this court the petitioners urge error of the superior court of Whatcom county, Washington, in denying said petition for the removal of said cause to the said United States circuit court; that this court by its judgment and decision affirmed necessarily the action of the superior court in denying petitioners' application for removal of said cause to the said United States circuit court, and in so entering said judgment deprived and denied to these petitioners the privilege of the act of Congress above mentioned providing for the removal of actions from the state courts to the United States circuit court.

That petitioners are entitled by reason of the denial of the privilege granted them by said statute of the United States to have a writ of error from this court to the supreme court of the United States under the provisions of section 709 of the Revised Statutes of the United States.

Wherefore in order that your petitioners may obtain relief in the premises and have opportunity to show the errors complained of, your petitioners pray that it may be allowed in said cause and that a supersedeas in said cause be allowed your petitioners, and that said cause be transmitted to the honorable the supreme court of the United States at Washington, to determine said errors. And that proper orders touching the security required of your petitioners may be made.

Your petitioners will as in duty bound ever pray.

KERR & McCORD,
*Attorneys for Defendants and Appellants.*

Indorsed: Filed Oct. 31, 1911. C. S. Reinhart, Clerk.

416 In the Supreme Court of the State of Washington.

No. 9208.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff and Respondent,

v.

E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, PACIFIC AMERICAN FISHERIES, a Corporation, Defendants and Appellants.

*Assignment of Errors.*

That afterwards, to-wit, on the 31st day of October, 1911, came E. B. Deming, Deming-Gould Company, and Pacific American

Fisheries, plaintiffs in error, by their attorneys Kerr & McCord, and say that in the record and proceedings in the above entitled action there is manifest error in this, to-wit:

1. The superior court of the state of Washington for King county erred in denying the motion of plaintiffs in error to discharge the jury after a portion of the testimony had been taken, and it had become manifest that an accounting was necessary in order to determine the rights of the litigants and to proceed to take an accounting and to treat the cause as one cognizable only in equity, and in refusing to grant a motion of plaintiffs in error for a continuance.

2. In denying the several motions of E. B. Deming, Deming-Gould Company and Pacific American Fisheries, and each of them, for a nonsuit and for an instructed verdict as to each of the plaintiffs in error.

3. In denying the petition of the plaintiffs in error for a removal of the cause to the United States circuit court for the Western district of Washington, it appearing from the record at the time said petition was made that no evidence had been introduced showing or tending to show that either E. B. Deming or the Pacific American Fisheries had ever made any contract of any kind with the defendant in error with reference to the purchase of the salmon
417 in question, said petition for removal being based upon the ground of diversity of citizenship, Deming-Gould Company being an Illinois corporation and a resident and citizen of Illinois, the Pacific American Fisheries being a Maine corporation and a resident and citizen of Maine.

4. The superior court erred in denying the motion of plaintiffs in error for a new trial.

5. Said superior court erred in giving the 9th, 13th and 14th instructions to the jury, and erred in giving each of said instructions to the jury.

6. Said superior court erred in refusing to give the 1st, 2d, and 7th instructions requested by the plaintiffs in error, and erred in refusing to give each of said instructions.

7. The supreme court of the state of Washington erred in affirming the action of the superior court of the state of Washington in refusing to discharge the jury and to further conduct the trial of the case as an action in equity, and in refusing to grant the motion for a continuance made by plaintiffs in error and in affirming the action of the lower court in denying the motions for nonsuits made by E. B. Deming, Deming-Gould Company, and Pacific American Fisheries and each of them, and in denying the motions of the said Deming, Deming-Gould Company, and Pacific American Fisheries for an instructed verdict and for affirming the actions of said superior court in refusing to grant the petition of the plaintiffs in error for a removal of the action from the superior court of the state of Washington to the United States circuit court for the western district of Washington. And this court erred in affirming the action of the superior court in refusing to grant a new trial to the plaintiffs in error, and in affirming the action of the superior court in giving the jury the 9th, 13th and 14th instructions contained in

the superior court's charge to the jury, and in refusing to give the 1st, 2d, and 7th instructions requested by the plaintiffs in error.

8. The said superior court erred in rendering judgment for the sum of twelve thousand seven hundred dollars ($12,700) or any
418 other sum, in favor of the defendant in error and against the plaintiffs in error.

9. The supreme court erred in affirming the judgment of the superior court.

10. The said superior court and the supreme court of the state of Washington erred in denying to the plaintiffs in error the privilege granted to them under the provisions of the act of March 3, 1875, as amended by the acts of March 3, 1887, and the act of August 13, 1888, of the Congress of the United States, to have this action transferred from the superior court of the state of Washington to the United States circuit court for the western district of Washington.

11. And the said superior court and the supreme court erred in holding that it was not necessary in order to determine said cause to pass upon the petition of the plaintiffs in error to have said cause removed from the superior court of the state of Washington to the United States circuit court for the western district of Washington; it appearing from the testimony at the time the petition for the removal of said cause was filed in the superior court of Whatcom county, Washington, that the controversy was one between citizens of different states and that at the time said petition for removal was filed, the record for the first time disclosed the diversity of citizenship between the plaintiff in said action and the defendants in said action; it further appearing at the time said petition for removal was filed in the superior court that the record for the first time disclosed that E. B. Deming had no connection with and was not a party to the contract sued upon in the said action, that the refusal of the supreme court of the state of Washington to pass upon the action of the superior court in denying the petition for removal in effect denies to the plaintiffs in error the privilege of the statute heretofore mentioned in which the right of removal from the state courts to the federal courts is granted upon the ground of diversity of citizenship, the plaintiffs in the superior court in this action and the real defendants in the said superior court in said action being citizens and residents of different states.

KERR & McCORD,
*Attorneys for Plaintiffs in Error.*

Indorsed: Filed Oct. 31, 1911. C. S. Reinhart, Clerk.

419 In the Supreme Court of the State of Washington.

No. 9208.

CARLISLE PACKING COMPANY, Plaintiff and Respondent,
v.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation; PACIFIC AMERICAN FISHERIES, a Corporation, Defendants and Appellants.

*Order Granting Writ of Error.*

Now on this 31st day of October, 1911, on hearing read the petition of E. B. Deming, Deming-Gould Company, and Pacific American Fisheries, the defendants and appellants in the above entitled action praying for the allowance of a writ of error from the supreme court of the United States to the supreme court of the State of Washington, and it appearing by said petition and by the record in the above entitled case that said case is a proper case for the allowance of said writ, now therefore,

It is ordered by the undersigned, the Chief Justice of the Supreme Court of the State of Washington, that said writ be and the same is hereby allowed. And that said E. B. Deming, Deming-Gould Company, and The Pacific American Fisheries execute to the plaintiff their bond with surety thereon to be approved by the undersigned in the sum of twenty-five thousand dollars ($25,000), and said bond when executed and approved by the undersigned shall operate as a supersedeas bond in said action. And thereupon all further proceedings upon the judgment rendered by this court in said action shall be stayed pending the hearing and determination of said writ of error by the United States Supreme Court.

Dated this 31st day of October, 1911.

R. O. DUNBAR, *C. J.*,
*Chief Justice of the Supreme Court of the State of Washington.*

420 In the Supreme Court of the State of Washington.

No. 9208.

CARLISLE PACKING COMPANY, a Corporation, Plaintiff and Respondent,
v.
E. B. DEMING, DEMING-GOULD COMPANY, a Corporation; PACIFIC AMERICAN FISHERIES, a Corporation, Defendants and Appellants.

*Bond.*

Know all men by These Presents:

That we, E. B. Deming, Deming-Gould Company, a corporation, Pacific American Fisheries, a corporation, as principals, and Ameri-

can Surety Company of New York, a corporation, surety, are held and firmly bound unto Carlisle Packing Company, a corporation, in the full and just sum of twenty-five thousand dollars ($25,000), to be paid to it, its successors and assigns, to which payment well and truly to be made we do hereby bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31st day of October, A. D. 1911.

Whereas lately at a session of the supreme court of the state of Washington in a suit pending in said court between Carlisle Packing Company, as plaintiff, and E. B. Deming, Deming-Gould Company, and Pacific American Fisheries, as defendants, a final judgment has been rendered by said supreme court of the state of Washington against the said defendants and in favor of the plaintiff, for the sum of twelve thousand seven hundred dollars ($12,700) together with interest and costs, and the said defendants having obtained a writ of error, together with a copy thereof, and filed the same in the clerk's office of the said supreme court of the state of Washington to reverse said judgment in the aforesaid suit, and have applied for a citation directed to the said Carlisle Packing Company, citing
121 and admonishing it to be and appear in the supreme court of the United States at the time to be fixed in said citation.

Now the condition of the above obligation is such that if the said E. B. Deming, Deming-Gould Company, and Pacific American Fisheries shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, and pay said judgment if the same be not reversed, together with costs, interest, and increased costs, then this obligation to be void; otherwise to remain in full force and virtue.

E. B. DEMING,
By KERR & McCORD, *Attorneys.*
DEMING-GOULD COMPANY,
By KERR & McCORD, *Attorneys.*
PACIFIC AMERICAN FISHERIES,
By KERR & McCORD, *Attorneys.*
AMERICAN SURETY COMPANY OF NEW YORK,
By J. H. BROWN, *Attorney in Fact.*

[SEAL.]

The foregoing bond and the sufficiency of the surety thereon taken and approved by me this 31st day of October, 1911.

R. O. DUNBAR,
*Chief Justice of the Supreme Court of the State of Washington.*

Indorsed: Filed Oct. 31, 1911. C. S. Reinhart, Clerk.

422 In the Supreme Court of the United States.

No. —.

CARLISLE PACKING COMPANY, a Corporation, Defendant in Error and Respondent,

vs.

E. B. DEMING, DEMING-GOULD COMPANY, a Corporation, and PACIFIC AMERICAN FISHERIES, a Corporation, Plaintiffs in Error and Appellants.

*Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Washington, Greeting:

Because in the records and proceedings, as also in the rendition of judgment, which is in the Supreme Court of the State of Washington before you or some of you, being the highest court of law or equity in said State in which a decision could be had in the said suit between the Carlisle Packing Company, a corporation, plaintiff and respondent in said court, and defendant in error in this court, and E. B. Deming, Deming, Gould Company and Pacific American Fisheries, defendants and appellants in said court, and plaintiffs in error in this court, wherein was drawn in question a privilege claimed by the plaintiffs in error under a statute of the United States, and such privilege and right so claimed on the part of the said plaintiffs in error, specially and affirmatively set up and claimed in said cause, was denied by the said Supreme Court of the State of Washington, and the Superior Court of the State of Washington for Whatcom County, to the great damage of the said plaintiffs in error, to-wit:

423 E. B. Deming, Deming, Gould Company and Pacific American Fisheries, as by their complaint appears, we being willing the error, if any have been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you have the same in Washington on the 29th day of December, A. D. 1911, in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid, being inspected by said Supreme Court, any cause further to be done therein to correct that error in the light and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

Office Supreme Court, U. S.
FILED.
SEP 30 1912
JAMES H. McKENNEY,
CLERK

IN THE

# SUPREME COURT

OF THE

UNITED STATES

CARLISLE PACKING COMPANY,
a Corporation,
*Defendant in Error,*
vs.
E. B. DEMING; DEMING-GOULD COMPANY, a Corporation; and PACIFIC AMERICAN FISHERIES, a Corporation,
*Plaintiffs in Error.*

No. 511.

## WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

## BRIEF OF PLAINTIFF IN ERROR

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IN THE

# SUPREME COURT

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| CARLISLE PACKING COMPANY, a Corporation,<br>*Defendant in Error,*<br>vs.<br>E. B. DEMING; DEMING-GOULD COMPANY, a Corporation; and PACIFIC AMERICAN FISHERIES, a Corporation,<br>*Plaintiffs in Error.* | No._____ |

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

## BRIEF OF PLAINTIFF IN ERROR

### STATEMENT.

The writ of error in this case is to the Supreme Court of the State of Washington to review a judgment entered therein affirming a judgment of the

Superior Court of Whatcom County, Washington, wherein the defendant in error recovered judgment against the plaintiffs in error, and each of them, for the sum of $12,700.

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Washington,—the highest court in said State,—is predicated upon the fact that the plaintiffs in error claim a right and privilege under a statute of the United States which was denied by the Supreme Court of the State of Washington.

Plaintiffs in error, Deming-Gould Company and Pacific American Fisheries claimed the right, which was denied, to have the suit in which said judgment was entered removed from the Superior Court of Whatcom County, Washington, to the United States Circuit Court for the Western District of Washington under the provisions of the Act of March 3, 1875, as amended by the Act of March 3, 1887, and the Act of August 13, 1888, of the Congress of the United States relating to the removal of actions from State Courts to United States Courts.

Plaintiffs in error duly filed the necessary petition for the removal of said cause in conformity

with the statutes of the United States, which petition was summarily denied by the courts of the State of Washington.

The essential allegations of the complaint as filed in the Superior Court of Whatcom County, Washington, are as follows:

That on or about the_____day of_____ 1907, the defendant E. B. Deming, acting for himself and his co-defendants, entered into a contract with this plaintiff for the purchase of all of the salmon fish packed and to be packed by this plaintiff for the season of 1907.

That said agreement was that the said defendants would purchase from this plaintiff, who would sell to said defendants, all of the several grades and varieties of salmon to be packed by plaintiff during the season of 1907, and pay plaintiff for each grade of salmon the opening price thereof, of each grade, kind and size, and make payments as the same were shipped and within ten days from the date of delivery, with an allowance of 1½% for cash discount and 5% brokerage. Deliveries were to be made to some railway terminal point at the expense of plaintiff, and the said defendants were to furnish shipping instructions on or before Jan-

uary 1st, 1908, or take whatever portion remained unmoved at that time, and pay for the same, warehousing it if necessary, and all expenses of such disposition, and shipping instructions were to be given to this plaintiff at and before the time for delivery.

That pursuant to said contract this plaintiff delivered to the said defendants all of its pack and the said defendants took said pack and paid for same, except as hereinafter set forth.

That the opening prices and sum which the defendants agreed to pay for such pack were as follows: Sockeye talls, $1.65; sockeye flats, $1.80; pink talls, 80c; pink flats, 90c; pink halves, 60c.

That the words "talls" and "flats" have reference to each twelve cans of one pound capacity or a half pound capacity; that each case of salmon contained four dozen cans or forty-eight cans in all, of one pound capacity.

That amongst others of the pack sold to the defendants by said plaintiff were 10,903 pink flats the opening value and price of which was 90c per dozen, or $3.60 per case, and at the direction and upon the instructions of the said defendants said salmon were delivered between the 4th day of Oc-

tober, 1907, and January 1st, 1908, and the price so agreed to be paid became due and payable to plaintiff.

That said defendants, disregarding their contract aforesaid, after the receipt of the property as aforesaid, refused to pay this plaintiff for the said 10,903 cases of pink flats and abandoned the said property to this plaintiff, after making it subject to charges for warehousing and insurance placed by the said defendants, and this plaintiff, in order to save itself, was required to take said salmon and to sell the same upon a depreciated market and at a less price than the defendants had agreed to pay, and was required to pay the insurance and warehouse charges incurred against said property.

That said property was sold to said defendants at the sum of $36,786.20 and plaintiff was required to retake and sell the same for a total sum of $30,001.75, whereby it lost $6,784.45 on said salmon, and it lost on account of moneys paid out, storage and insurance $1,796.84 and on commissions the sum of $1,530.68 and it was deprived of the use of its money and was required to pay interest on account thereof amounting to $2,146.16.

That because of the acts and doing of the said defendants and their failure to keep and perform their contract as aforesaid this plaintiff has suffered loss and damage in the sum $12,955.04 with interest thereon since January 1st, 1908. (Record pp. 1 to 4.)

All the material allegations of the complaint were denied by the answer of the plaintiffs in error. (Record, pp. 1 to 6.) The case was tried to a jury and on the 5th of May, 1910, a verdict of $12,700 was rendered in favor of the defendant in error and against the plaintiffs in error and judgment thereafter entered thereon. From this judgment an appeal was taken to the Supreme Court of the State of Washington (Record, p. 10) and on the 17th of March, 1911, the judgment in the Superior Court of Whatcom County, Washington, was affirmed by the Supreme Court of the State of Washington (Record, pp. 258-261.) Thereafter, on October 13th, 1911, a petition for rehearing was denied by the Supreme Court of the State of Washington (Record, p. 261.) Thereafter on the 31st of October, 1911, a petition for writ of error was filed in the Supreme Court of the State of Washington by the plaintiffs in error (Record,

pp. 261-264) and assignments of error filed therein. (Record, pp. 264-6.) An order granting the writ of error was duly entered on the 31st of October, 1911, by the Chief Justice of the State of Washington (Record, p. 267) and a bond on behalf of plaintiffs in error was duly filed (Record, pp. 267-8) and the writ of error and citation were thereafter issued and served. (Record, pp. 269-271.)

It is contended on the part of the defendant in error that in the spring of 1907 the plaintiffs in error purchased all of the canned salmon to be packed by the defendant in error during the season of 1907 at the opening prices for salmon for that season, upon which the plaintiffs in error were to be allowed a commission of 5% and a discount of 1½% and that any salmon that was unsold by the plaintiffs in error February 1, 1908, should be taken over by them at the opening prices. Plaintiffs in error denied that any such contract was made. The evidence shows that Deming-Gould Company did make an agreement for the handling of the salmon of the defendant in error for the year 1907, and the Deming-Gould Company contended that it agreed to handle the salmon of the defendant in error for that season upon a purely

brokerage basis and that it did not agree to take over the salmon remaining unsold on February 1st, 1908, at the opening prices or at all, but that it did agree to take it over on that date, if desired by the defendant in error, at the then market price of such salmon remaining unsold. Defendant in error also contended that the plaintiffs in error refused to pay for 10,903 cases of pink flat salmon and abandoned said salmon to defendant in error, after making it subject to charges for warehousing and insurance placed by said plaintiffs in error, and that the defendant in error, in order to save itself was required to take said salmon and sell the same upon a depreciated market and at a less price than the plaintiffs in error had agreed to pay, and were required to pay the insurance and warehouse charges against the salmon.

## ASSIGNMENTS OF ERROR.

1. The Superior Court of the State of Washington for Whatcom County erred in denying the motion of plaintiffs in error to discharge the jury after a portion of the testimony had been taken, and it had become manifest that an accounting was necessary in order to determine the rights of the

litigants and to proceed to take an accounting and to treat the cause as one cognizable only in equity, and in refusing to grant a motion of plaintiffs in error for a continuance.

2. In denying the several motions of E. B. Deming, Deming-Gould Company and Pacific American Fisheries, and each of them for a nonsuit and for an instructed verdict as to each of the plaintiffs in error.

3. In denying the petition of the plaintiffs in error for a removal of the cause to the United States Circuit Court for the Western District of Washington, it appearing from the record at the time said petition was made that no evidence had been introduced showing or tending to show that either E. B. Deming or the Pacific American Fisheries had ever made any contract of any kind with the defendant in error with reference to the purchase of the salmon in question, said petition for removal being based upon the ground of diversity of citizenship, Deming Gould Company being an Illinois corporation and a resident and citizen of Illinois, the Pacific American Fisheries being a Maine corporation and a resident and citizen of Maine.

4. The Superior Court erred in denying the

motion of the plaintiffs in error for a new trial.

5. Said Superior Court erred in giving the 9th, 13th, and 14th instructions to the jury, and erred in giving each of said instructions to the jury.

6. Said Superior Court erred in refusing to give the 1st, 2d and 7th instructions requested by the plaintiffs in error, and erred in refusing to give each of said instructions.

7. The Supreme Court of the State of Washington erred in affirming the action of the Superior Court of the State of Washington in refusing to discharge the jury and to further conduct the trial of the case as an action in equity, and in refusing to grant the motion for a continuance made by plaintiffs in error and in affirming the action of the lower court in denying the motions for nonsuit made by E. B. Deming, Deming-Gould Company, and Pacific American Fisheries and each of them, and in denying the motions of the said Deming, Deming-Gould Company, and Pacific American Fisheries for an instructed verdict, and for affirming the actions of said Superior Court in refusing to grant the petition of the plaintiffs in error for a removal of the action from the Superior Court of the State of Washington to the United States Cir-

cuit Court for the Western District of Washington. And this Court erred in affirming the action of the Superior Court in refusing to grant a new trial to the plaintiffs in error, and in affirming the action of the Superior Court in giving the jury the 9th, 13th and 14th instructions contained in the Superior Court's charge to the jury, and in refusing to give the 1st, 2d and 7th instructions requested by the plaintiffs in error.

8. The said Superior Court erred in rendering judgment for the sum of $12,700 or any other sum, in favor of the defendant in error and against the plaintiffs in error.

9. The Supreme Court erred in affirming the judgment of the Superior Court.

10. The said Superior Court and the Supreme Court of the State of Washington erred in denying to the plaintiffs in error the privilege granted to them under the provisions of the act of March 3, 1875, as amended by the act of March 3, 1887, and the act of August 13, 1888, of the Congress of the United States, to have this action transferred from the Superior Court of the State of Washington to the United States Circuit Court for the Western District of Washington.

11. And the said Superior Court and the Supreme Court erred in holding that it was not necessary in order to determine said cause to pass upon the petition of plaintiffs in error to have said cause removed from the Superior Court of the State of Washington to the United States Circuit Court for the Western District of Washington, it appearing from the testimony at the time the petition for the removal of said cause was filed in the Superior Court of Whatcom County, Washington, that the controversy was one between citizens of different states and that at the time said petition for removal was filed, the record for the first time disclosed the diversity of citizenship between the plaintiff in said action and the defendants in said action; it further appearing at the time said petition for removal was filed in the Superior Court that the record for the first time disclosed that E. B. Deming had no connection with and was not a party to the contract sued upon in said action, that the refusal of the Supreme Court of the State of Washington to pass upon the action of the Superior Court in denying the petition for removal in effect denies to the plaintiffs in error the privilege of the statute heretofore mentioned in which the right of removal

from the State Courts to the Federal Courts is granted upon the ground of diversity of citizenship, the plaintiff in the Superior Court in this action and the real defendants in the said Superior Court in said action being citizens and residents of different states.

## ARGUMENT.

*Third, Seventh, Tenth and Eleventh Assignments of Error*:

The 3d, 7th, 10th and 11th assignments of error involved the error of the State Court in denying the petition of Deming-Gould Company and Pacific American Fisheries to remove the action from the Superior Court of the State of Washington to the United States Circuit Court for the Western District of Washington, and may conveniently be discussed together.

Deming-Gould Company is a corporation, organized under the laws of the State of Illinois and is a citizen and resident of the State of Illinois, and was such citizen and resident at all the times mentioned in the record; Pacific American Fisheries is a corporation organized under the laws of

the State of Maine and is a citizen and resident of the State of Maine and was such citizen and resident at all the times mentioned in the record. The action in the Superior Court of Whatcom County, Washington, was instituted against E. B. Deming, Deming-Gould Company and Pacific American Fisheries and a judgment was sought against each of them, upon an alleged express contract. From the allegations of the complaint it was not apparent that any diversity of citizenship existed that would justify or support a petition for removal from the State Court to the Federal Court; consequently the parties proceeded to trial upon the issues so made up and no petition for removal was interposed prior to the trial.

However, as the trial proceeded and evidence was introduced on the part of the respective parties to the action it developed that there was absolutely no evidence introduced establishing or attempting to establish any liability against E. B. Deming or Pacific American Fisheries, or either of them, and it further appeared that the defendant in error was fully cognizant of the fact that the said E. B. Deming and Pacific American Fisheries had nothing whatever to do with the contract sued

upon and were not parties to said contract.

Frank Wright was the president of the Carlisle Packing Company during all of the time the negotiations connected with the sale of the salmon were in progress, and Wright testified on the trial of the case that his alleged contract for the sale of the salmon in question was made between the Carlisle Packing Company on the one part and Deming-Gould Company upon the other. He testified as follows:

Q. You made the contract with E. B. Deming as the man you negotiated the contract with, but the party making it, the party you made it with, was Deming-Gould Company of Chicago, fish brokers, to handle your pack?

A. I understood it was Deming-Gould Company buying it.

Q. As a matter of fact, in July, 1908, you notified Deming-Gould Company through Dorr & Hadley, then acting as your attorneys, that you would hold them responsible for this damage?

A. Yes, sir.

Q. Then, as a matter of fact, your contract, while made through the instrumentality of Mr. E. B. Deming, was in fact made with Deming-Gould Company for handling these salmon?

A. I had no way of knowing that except from what was told to me.

Q. He told you it was for the Deming-Gould Company?

A. I think I understood—I would not be quite sure about it.

Q. As a matter of fact, on July 2, 1908, 15 months afterward you thought so to the extent of writing Deming-Gould Company a letter demanding that they pay you the damages?

A. Yes, sir.

Q. You thought so during that entire period of time and you knew that Deming-Gould Company were engaged in the salmon brokerage business in the City of Chicago, did you not?

A. I knew that Mr. Deming represented the Pacific American Fisheries and Deming-Gould Company, and I was not quite clear which one he was representing in this instance, but I think it was the Deming-Gould Company.

Q. I will ask you if, as a matter of fact, you did not know that Deming-Gould Company was engaged in the salmon brokerage business and in that business they were handling salmon?

A. Yes, sir.

Q. And you made it with Deming-Gould Company, as shown by your letter?

A. With E. B. Deming. I do not know whether it was with the Deming-Gould Company or not.

Q. You say to the best of your knowledge it was with the Deming-Gould Company?

A. Yes, I understood it was. I do not know

whether Mr. Deming said so or not, or whether I took it for granted, but I did understand it that way.

Q. I am asking about the contract made for the sale of these goods; there is no question as to the contract having been made between the Carlisle Packing Company on the one part and Deming-Gould Company on the other part?

A. I understood it was about that way.

Q. There was no doubt in your mind but that was the party you were dealing with at that time?

A. I understood that,—yes, sir.

Q. You do not pretend that Mr. Deming bought any of your salmon individually?

A. I do not know who he bought it for, but he bought it.

Q. You said he never bought any for himself?

A. I suppose he was acting for the Deming-Gould Company.

Q. Did he ever give you any personal checks for these salmon?

A. No sir. The Deming-Gould Company did and the Pacific American Fisheries.

Q. You did not sell any to him,—you never got any money from him personally?

A. No sir.

Q. In referring to Mr. Deming you referred to him in his representative capacity as the president of these various corporations?

A. Yes, sir.

(Record, pp. 102-3-4).

Mr. Wright further testified that on the 5th of February, 1907, he received from the Deming-Gould Company $52,000 on account of the purchase price of the salmon and that this money was paid into the First National Bank of Bellingham by Deming-Gould Company. (Record, p. 109.)

Mr. E. W. Purdy, President of the First National Bank, testified that the money on account of the salmon was paid by Deming-Gould Company. (Record, p. 128.)

Mr. E. B. Deming testified as follows:

Q. For whom were you acting in your dealings with Mr. Wright?

A. Deming-Gould Company.

Q. Were you acting in an individual capacity in any respect?

A. No sir.

Q. Did you have any interest in the proposed contract?

A. Only through my interest in the Deming-Gould Company.

Q. I mean individually?

A. No sir.

Q. What was the sole and only party in interest, other than the Carlisle Packing Company?

A. Deming-Gould Company.

(Record, p. 191.)

Mr. Wright further testified that he never sold any salmon to the Pacific American Fisheries, but that the Pacific American Fisheries acquired some of the goods from Deming-Gould Company. (Record, pp. 104-5.)

From the foregoing testimony and from an examination of the record the Court will be forced to the conclusion that Mr. Wright, the President of the Carlisle Packing Company knew at the time he made the contract referred to in the complaint and at the time of the commencement of the action that the Pacific American Fisheries and E. B. Deming were strangers to the contract sued upon and that the Carlisle Packing Company had no claim whatsoever against them or either of them growing out of the contract relating to the sale of the salmon mentioned in the complaint.

After the testimony had been concluded and the parties had rested, Deming-Could Company and Pacific American Fisheries, plaintiffs in error, filed their petition for removal from the State Court to the Federal Court (Record, pp. 12-14), and said petition was presented to the Court, together with the bond, which the Court was requested to approve. The Court thereupon denied the petition to remove

summarily and refused to approve the bond (Record, p. 243), and this action of the Superior Court of Whatcom County, Washington, in denying said petition to remove was affirmed by the Supreme Court of the State of Washington.

The petition for removal showed that the amount in controversy exceeded $2,000, exclusive of interest and costs and that controversy was between citizens of different states; that the Deming-Gould Company was a citizen and resident of the State of Illinois and the Pacific American Fisheries was a citizen and resident of the State of Maine; that the Carlisle Packing Company was a citizen and resident of the State of Washington, and that E. B. Deming was a citizen and resident of the State of Washington. The petition also averred that E. B. Deming was made a party defendant to the action by the defendant in error fraudulently, improperly and wrongfully and for the sole and only purpose of depriving the Circuit Court of the United States for the Western District of Washington of jurisdiciton over the subject matter in controversy in the action, and for the purpose of depriving said Circuit Court of jurisdiction of the defendants and plaintiff in said action and for the

purpose of preventing Deming-Gould Company and Pacific American Fisheries from removing the case from the State Court to the Federal Court; that E. B. Deming was not and is not a proper party to the action and was not at the time of the commencement of the action and was not at the time of the trial a proper party defendant; that upon the face of the complaint and upon the face of the record at the time of the commencement of the trial of this action no ground for removal from the State to the Federal Court appeared; that all of the testimony in the case had been introduced and both parties had rested, and that from the evidence introduced at the trial it had been demonstrated beyond a doubt that the defendant E. B. Deming is not in any way connected with the controversy in this action and that it appeared from the testimony that no contract was ever made by the plaintiff with the defendant E. B. Deming, as set forth in the complaint, and that said Deming, in making the alleged contract, had acted solely in a representative capacity and as an officer of the Deming-Gould Company. That at the time the plaintiff rested it manifestly appeared that the defendant E. B. Deming had been improperly made a party

to said suit and for the purpose of holding said action in the State Court and in order to deprive the Federal Court of jurisdiction of the subject matter and of the parties to the action, and that at the conclusion of the testimony the status of the case disclosed for the first time the right of the defendants Deming-Gould Company and Pacific American Fisheries to remove said action to the Federal Court on the ground of diversity of citizenship and by reason of the fact that E. B. Deming was improperly and wrongfully made a party defendant in said action, and that by reason of plaintiff's improperly including said defendant E. B. Deming as a party defendant in the action the petitioners were deprived of the right and privilege of removing the action to the Federal Court. That upon the record as it then stood and the testimony introduced in the case and upon the affidavit of E. B. Deming filed with the petition, the application was made to the State Court for removal of the action to the United States Circuit Court for the Western District of Washington, and such petition was presented with a bond immediately after the conclusion of the testimony, and the presentation of the petition and bond was made at

the first and only opportunity petitioners had to ask for the removal, after it had appeared conclusively that E. B. Deming was not a proper party to the action and that he had nothing to do with the contract for the handling of the salmon individually, and that it was known to the plaintiff at the time of the commencement of the action that E. B. Deming was not a party to the original contract for the handling of the salmon and was not a party to the action and that he had been made a party fraudulently for the purpose of preventing the Federal Court from assuming jurisdiction of the action.

It is manifest that E. B. Deming was fraudulently and wrongfully made a party to the case without cause and without right, and for the fraudulent purpose of depriving the Federal Court of jurisdiction. Had he not been so fraudulently made a party to the action the Deming-Gould Company and Pacific American Fisheries could not have been deprived of their privilege of having the case removed to the Federal Court and they had a right to have the case removed whenever it appeared that no cause of action existed against the said Deming, and this right is one of which they could

not have been deprived by any fraudulent action on the part of the plaintiff in error. It is an absolute right given by the acts of Congress above mentioned of which they could not be divested by any fraudulent scheme on the part of the plaintiff in error to retain the action in the State Court. Such must be the law, otherwise any litigant could evade the law and prevent the Federal Court from acquiring jurisdiction in any case of removal from the State Court. The only thing necessary to oust the Federal jurisdiction would be to name as one of the defendants a disinterested citizen of the same state as the plaintiff.

In the case of *Wecker v. National Enameling & Stamping Company*, 204 U. S., 176, it was held:

"A Federal Circuit Court to which a case has been removed as presenting a separable controversy properly refuses to remand the cause to the State Court, where the testimony shows that the real purpose of the plaintiff in suing jointly in tort a resident employe and his non-resident employer was to prevent the exercise of the right of removal by the non-resident defendant."

And further;

"Uncontradicted testimony that a resident employe sued jointly in tort with his non-resident employer was merely a draftsman, whose work was confined to making the necessary drawings based

on the plans and ideas of others, and that he had nothing to do with planning the apparatus which is alleged to have been so defectively constructed as to have caused the injury complained of, is sufficient to support a conclusion of law that such employe was made a defendant for the sole purpose of preventing the exercise of the right of removal by the non-resident defendant."

And the Court further says:

"In the first ruling upon the motion to remand, the Court, in a written opinion, based its refusal upon the ground that the petition of the plaintiff clearly showed that there was no joint cause of action against the company and the defendant Wettengell. Subsequently the Judge filed an opinion in which he said that in his former opinion he made no allusion to the affidavits tending to show the fictitious and fraudulent joining of Wettengell, and that, in his opinion, the same inevitably showed that the inferences drawn from the allegations of the petition were correct, and that he might properly consider these affidavits in determining the question of removal."

In the *Wecker* case the petition to remove from the State to the Federal Court was supported by affidavits to the effect that the resident defendant, who had been made a party to the action, had nothing to do with the case. But it was urged upon the argument that there was no proof that Wecker knew of Wettengell's true relation to the defendant; consequently he would not be guilty of fraud in joining him; but the Court said:

"Even in cases where the direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach."

And in the *Wecker* case the Court further distinguished the case of *Alabama Great Southern Railway Company v. Thompson*, 200 U. S., 206, and said:

"In that case it was held that, upon a question of removal, where a plaintiff, in good faith, prosecuted his suit as upon a joint cause of action and the removal was sought when the complaint was the only pleading in the case, the action as therein stated was the test or removability; and if that was joint in character, and there was no showing of a want of good faith of the plaintiff, no separable controversy was presented with a non-resident defendant joined with a citizen of the state; in other words, if the plaintiff had in good faith, elected to make a joint cause of action, the question of proper joinder is not to be tried in the removal proceedings, and that, however that might turn out upon the merits, for the purpose of removal the case must be held to be that which the plaintiff has stated in setting forth his cause of action."

But in the case at bar the evidence shows that the Carlisle Packing Company knew at the time of the commencement of the action that the contract sued upon was not made with E. B. Deming individually but was in fact made with the Deming-Gould Company and the conclusion is ir-

resistible and inevitable that E. B. Deming was not made a party defendant in good faith. He was known by the plaintiff at the time of the commencement of the action to have been a stranger to the contract and the sole and only purpose of making him a party was to anchor the action in the State Court and prevent the non-resident defendants from exercising and availing themselves of the privilege of removing the action to the Federal Court if they so desired. E. B. Deming was manifestly made a party defendant with the fraudulent purpose in view of compelling the non-resident defendants to submit to the trial of the cause in the State Court and amounted to a denial of their right to have the action removed to the Federal Court, under the provisions of the Federal statute.

We cannot conceive of a stronger case of a fraudulent action on the part of a plaintiff in joining a resident defendant with a non-resident defendant for the purpose of ousting the Federal Court of jurisdiction.

The uncontradicted testimony of the President of the Carlisle Packing Company,—to say nothing of the testimony of E. B. Deming, conclusively shows that the contract in regard to the sale of the

salmon was made solely with the Deming-Gould Company and not with E. B. Deming of the Pacific American Fisheries.

We are aware that the Federal Judiciary Act requires a petition for removal to be made within the time for answering after the service of process, according to the State statutes and in the State of Washington the time is limited to 20 days. It is also true that the defendants in this action did not file their petition for removal within the 20 days provided by the Federal statute; and the Deming-Gould Company and the Pacific American Fisheries did not file their petition for removal until it became apparent from the record that cause for removal existed. This right of Deming-Gould Company and Pacific American Fisheries to remove their cause to the Federal Court at the time the petition was presented to the Federal Court has been upheld by a decision of this Court in the case of *Powers v. C. & O. Ry. Co.*, 169 U. S. 100.

In that case an action was brought by Powers against the Railway Company, and as well against Boyer, Evans and Hickey, the conductor, engineer and fireman, for the recovery of damages for personal injuries. Powers, Boyer, Evans and Hickey

were citizens of Kentucky, the Railway Company a citizen of West Virginia. Within the time for answer provided by the laws of Kentucky a petition for removal was filed, upon the ground, among other things, that Boyer, Evans and Hickey were fraudulently and improperly joined for the sole purpose of defeating the right of the Railway Company to have the case removed and on the ground that it was a separable controversy. The action was remanded by the Federal Court to the State Court. One year after the first petition had been presented, when the case was called for trial in the State Court the plaintiff discontinued his action against the defendants Boyer, Evans and Hickey. Thereupon the Railway Company filed its petition for the removal of the cause to the Federal Court. This was denied by the State Court and judgment entered in favor of the plaintiff in the State Court. It was finally held by the Supreme Court that the Railway Company had the right to have the case removed at the time of the trial. In discussing the *Powers* case the Supreme Court says:

"The existence of diverse citizenship, or other equivalent condition of jurisdiction is fundamental. The want of it will be taken notice of by the Court

of its own motion and cannot be waived by either party. *Railway Company v. Swan*, 111 U. S., 379. But the time for filing a petition for removal is not essential to the jurisdiction. The provision upon that subject is, in the words of Mr. Justice Bradley, 'but modal and formal' and a failure to comply with it may be the subject of waiver or estoppel. *Ayres v. Watson*, 113 U. S., 594. Undoubtedly, when the case, as stated in plaintiffs' declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the State to make any defense whatever in its courts. *Edrington v. Jefferson*, 111 U. S., 770. But it by no means follows, when the case does not become in its nature a removable one until after the time mentioned in the act has expired, that it cannot be removed at all."

And in the same case the Court further said:

"The question whether a defendant may file in the State Court in which the suit was commenced a petition for removal after the time mentioned in the act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place.

"In order to warrant a removal from a court of a state into a Circuit Court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the Circuit Court of the United States must exist. It is only when it does exist that 'any party entitled to remove any suit' 'may make and file a petition in such suit in such State Court at

the time, or at any time before the defendant is required by the laws of the state, or the rule of the State Court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the Circuit Court to be held in the district where such suit is pending.' Act March 3d, 1887. 25th Stat. at Large, 435.

"This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it and the provision of the act of Congress that 'any party entitled to remove any suit' 'may make and file a petition for removal' at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting, to the time prescribed for answering the declaration, the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute, but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same state as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering, or whenever a personal injury was supposed at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2,000, and was afterward discovered to be so much graver, that there could be no doubt of the power and the duty of the court to allow an amendment increasing the *ad damnum*.

"The reasonable construction of the act of Congress, and the only one which will prevent the right

of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and *to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the Court in which it was brought.*

"The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such an one as, by the express terms of the statute, the defendant Railway Company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time."

If, at the conclusion of the testimony in the case the Carlisle Packing Company had voluntarily dismissed the action as against E. B. Deming, under the express language of the decision of the Supreme Court in the *Powers* case, Deming-Gould Company and the Pacific American Fisheries would then have had the unquestionable right to remove the case to the Federal Court, and if the Court had granted the motion for a directed verdict as to E. B. Deming, then it would have been perfectly apparent that the petition for removal should unquestionably have been granted, and it is

our contention that the record at the time the petition was filed shows beyond peradventure that the motion for an instructed verdict in favor of E. B. Deming should have been granted. There is not a particle of evidence in the entire record tending to show that he was in any wise connected with the contract sued upon and that the plaintiff knew at the time of the commencement of the action that Deming, as an individual, had nothing to do with the salmon contract. This record cannot be read without this Court being forced to this conclusion. The motion for an instructed verdict should have been granted, and E. B. Deming was entitled to have it granted. And upon the face of the record there was no evidence upon which a judgment could have been rendered against E. B. Deming.

When the testimony was finally closed and the petition for removal was presented, we contended that this petition for removal was presented in ample time. The Deming-Gould Company and the Pacific American Fisheries, the petitioners on the removal matter could not know what other testimony might be offered by the plaintiff connecting E. B. Deming with the transaction, and until the case was finally closed and all the testi-

mony was in the petitioners were unable to determine whether or not proof of a claim against E. B. Deming would be made. When it developed that there was no evidence of any kind against Deming as an individual, then, before taking any other step in the proceeding, the Deming-Gould Company and the Pacific American Fisheries filed their petition for removal to the Federal Court.

The Deming-Gould Company and the Pacific American Fisheries filed their petition for removal to the Federal Court.

The Deming-Gould Company and the Pacific American Fisheries by reason of diverse citizenship from the plaintiff had an unquestionable right to have this action tried by the Federal Court, if they desired. It was a right and privilege granted them by the act of Congress, and they could not be deprived of that right by any subterfuges on the part of the Carlisle Packing Company. The plaintiff could not deprive them of such right by naming as a defendant with them E. B. Deming, a party who under the evidence and under the record as it then existed and as it now exists, had no earthly connection with the controversy as a principal.

The refusal of the Court to grant the petition for removal at the time it was made was affirmed by the Supreme Court of the State of Washington and said action upon the part of said State Courts was erroneous and upon that ground the case should be reversed and the State Courts should be required to order the removal of the action to the United State Circuit Court for the Western District of Washington, in accordance with the prayer of the petition for removal.

But it will be contended by counsel for the plaintiff in error that the determination of the question as to the right of removal from the State Court to the Federal Court was not necessary to the decision and that the judgment of the Supreme Court of the State of Washington was based upon another and independent ground.

The general rule is that:

"To give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a federal question was presented to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Johnson *v. Risk*, 137 U. S., 300.

And the plaintiffs in error were entitled to have the question passed upon by the Supreme Court of the State and the effect of the decision of the Supreme Court was to affirm the action of the Superior Court of Whatcom County in denying the petition for removal. The only suggestion made by the Supreme Court of the State of Washington was that the defendants had answered jointly, and, by some circuitous reasoning difficult to understand, that the plaintiffs in error had waived their privilege and right of having the cause removed to the Federal Court.

Regardless of whether the opinion in express language evaded the decision of the Federal question, the judgment in effect did pass upon the question, and denied the right of the petitioners to have the case removed, and denied them the right granted to them by the act of Congress.

The opinion says:

"If the defendant Deming desired to deny that he made the contract for himself personally or for the Pacific American Fisheries, that fact should have been set up in the answer. When all joined in the answer they thereby took issue upon the facts jointly, and if the contract alleged was proved all were necessarily bound jointly."

This cannot be the law. The complaint alleged that the defendants and each of them entered into the contract with the plaintiff for the purchase of the salmon. The defendants denied that they had done so. The denial simply raised the general issue. It was not necessary for the defendants, or either of them, to plead affirmatively than an entirely different contract was made from that alleged in the complaint. Suppose that Deming had filed a separate answer and had denied the allegations of the complaint. It cannot for a moment be contended that under the general issue thus raised by him he would not have been permitted to show by his proofs that the contract alleged in the complaint was not the contract shown, and, further, as evidentiary of that fact, that an entirely separate and distinct contract was in fact made. It would not have been good pleading for him to have pleaded affirmatively that another contract, different from the one set forth in the complaint, was in fact made. Such fact, under all the authorities, was admissible under the general issue.

The defendant, Deming-Gould Company, denied the making of the contract set forth in the com-

plaint. It also could have shown, had it filed a separate answer, that an entirely different contract from that alleged in the complaint was in fact made, and the same is true as to the Pacific American Fisheries. In other words, there was no evidence offered in this case that was not properly admissible under the general issue. The joining of the defendants in the general issue interposed a denial of every allegation of the complaint on the part of each of the defendants.

The Court's statement of the principle we think is entirely erroneous. The Court says: "When all joined in the answer they thereby took issue upon the facts jointly, and if the contract alleged was proved, all were necessarily bound jointly." In other words, it is our contention that this rule of law as stated by the Court is wholly inapplicable to the facts presented by these pleadings. The proper application of the rule is to cases where affirmative defenses are interposed jointly, and the rule is that if the plea is bad as to one defendant it is bad as to all. It means that if the defense set up in the joint answer is bad as a matter of law as to one defendant, it is bad as to all; that as a

matter of law it must be good as to all defendants or it is bad altogether.

"The rule that if two or more defendants join in a plea which is sufficient, but not for the others, the plea is bad for all, has reference only to pleas of justification in which the facts charged are necessarily confessed, but not to the general issue."

*Hayden v. Nott*, 9 Conn., 367.

"The mere fact that a joint answer is filed is not an admission of joint liability."

31 Cyc., 138.

And in the case of *Levesay v. First National Bank of Denver*, 86 Pac., 102, it is said:

"We do not believe the mere fact of joining in a joint answer by defendants who are charged with joint liability has any weight as evidence to prove such joint liability in the absence of proof of other acts or facts which would prove such joint liability."

Manifestly the Court in announcing the above rule was misled as to the liability of the defendants under a joint answer. The rule has reference only to the sufficiency of pleas as a matter of law and not to facts given in proof of pleas. If the plea on its face is bad as to one, it is bad as to all; if it is insufficient as to one, it is insufficient as to all.

But the statute provides that the defendants may join in an answer, but by doing so it was not intended to affect their liability.

The Court in its opinion admits, and the record clearly establishes the fact, that the defendant in error never had any contractual relations with either the Pacific American Fisheries or with Mr. Deming with regard to this salmon. The contract was made with the Deming-Gould Company. Mr. Wright testified that he understood he was dealing with the Deming-Gould Company, and Mr. Deming stated that he was dealing for the Deming-Gould Company throughout the entire transaction. The Deming-Gould Company paid for all the salmon that was taken under the contract. The drafts of that company were accepted by the defendant in error in payment for the salmon that were taken, and yet the Court, in the face of these facts, and admitting that there was nothing in the record to bind E. B. Deming or the Pacific American Fisheries, nevertheless entered judgment against both of them. The evidence is not conflicting as to their liability. The witnesses for the plaintiff and the witnesses for the defendants unanimously concurred in the statement that

neither Deming nor the Pacific American Fisheries was in any respect liable, and yet the Court apparently announced the unconscionable statement that merely because they joined in an answer in a general denial, they thereby became liable. If such is the law, then what would have been the action of the Court had the jury found that the Deming-Gould Company was liable upon the breach of the contract set forth in the complaint, and that Deming and the Pacific American Fisheries were not liable? Under the logic of the Court's decision, it would have been the duty of the Court, notwithstanding the verdict in favor of Deming and the Pacific American Fisheries, to have entered up judgment against them.

"Where separate pleas of the same nature are filed by co-defendants, the practical result is the same as if they join in one."

*McGuire v. Gerstley*, 204 U. S., 439.

And the authorities cited by the Court in support of its statement as to the joint answer sustain our contention.

But irrespective of the effect of the joint answer of the defendants it cannot be said that the judgment can be sustained upon other grounds and that the Federal question was not necessary to the decision. The right of removal from a state to a Federal Court is not so intimately connected

with the issues in the case as to bring the case within the reasoning of this decision, which held that where a State Court decided a question upon a ground other than the one involving the Federal question, this Court will not interfere with the decision of the State Court. If this were not true then there would be no way to bring to this Court and have determined the right of a defendant to have his case removed to a Federal Court. In every case a State Court could ignore or refuse to pass upon the right of removal and the party asking for removal would be without remedy, because in every case where this question is presented to the Supreme Court of the State the Court could ignore or refuse to pass upon the question and decide the case upon the issues as made up in the pleadings. But the refusal to pass upon it is equivalent, in a case of this kind, to a denial of the petition.

## FIRST ASSIGNMENT OF ERROR.

At the time the plaintiffs in error made the motion to discharge the jury and to treat the action as an equity cause and to proceed to take an ac-

counting between the parties, the evidence showed that on the 5th of February, 1908, plaintiffs in error were not in possession of the salmon and never had been in possession thereof; that no delivery of the salmon had ever been made by the defendant in error to the plaintiffs in error or to any of them, but that the salmon remained in the possession and custody and under the control of the defendant in error; that the salmon had been stored in the warehouse of the defendant in error at Lummi Island, Washington, where the cannery of the defendant in error is located, and that warehouse receipts had been issued by warehousemen to the First National Bank of Bellingham; that subsequently and prior to the 5th of February, 1908, the salmon had been removed to the warehouse of the Bellingham Warehouse Company at South Bellingham, Washington, and new warehouse certificates had been issued by the Bellingham Warehouse Company to the defendant in error and that these new warehouse certificates had been endorsed and transferred by the defendant in error to the First National Bank of Bellingham by way of substitution for the former warehouse certificates and that they were held by the bank as

security for an obligation owing by the defendant in error to the bank; that after the 5th of February, 1908, and some months thereafter, beginning with the 2d of July, 1908, the defendant in error proceeded to sell said salmon to numerous purchasers; that upon each sale it was necessary, in order to determine the net amount realized by the defendant in error, to ascertain the freight charges, insurance charges, cartage, drayage and warehouse charges, storage charges, discounts, commission, interest and other expenses connected with the sale; that a large number of sales were made of different quantities of salmon, and that in order to determine the net amount received by the defendant in error an accounting was necessary. To determine this amount imposed upon the jury the necessity of investigating twenty-five to thirty shipments of salmon, made at various times to various parties and in various amounts, extending over a period of time beginning in July, 1908, and extending for more than a year, and involving a computation of partial payments made from time to time during such period and involving a vast number of items. The defendant in error contended that the salmon had been delivered to the

plaintiffs in error and that the defendant in error had received it back. The defendant in error proceeded upon the theory that it could sell the salmon after notice to the plaintiffs in error and recover the difference between the price received and the contract price.

Thereupon it became the duty of the defendant in error to account to the plaintiffs in error for all sums received by it for the salmon. The relation of trustee and *cestui que trust* became established by the election of the defendant in error to take back the salmon and to sell the same for the best obtainable prices. (35 Cyc., 524.) A trust on the part of the defendant in error arose from the transaction, and it was the duty of the defendant in error, acting as such trustee, to faithfully account for all sums received by it during the progress of the sales of the salmon. The amount for which the defendant in error, as such trustee, was required to account was undetermined and unliquidated and the result could not be determined by a jury, but a cause of equitable cognizance was established, and it was the duty of a Court of equity to assume this responsibility and duty and to discharge the jury and to proceed with the accounting.

In the case of *Maitland v. Purdy*, 49 Wash., 575, the Supreme Court of Washington, referring to the case of *Goupille v. Chaput*, 43 Wash., 702, said:

"In the last named case it was held that, when it developed in an action to recover money that the amount can only be ascertained through an accounting, the case must be withdrawn from the jury and an accounting had, the pleadings being considered amended to conform to the facts. In essential particulars that case is similar to this one, and the rule there followed should govern here."

And in the case of *Goupille v. Chaput, supra*, the Court further said:

"It appears from respondent's own testimony that there was no liquidated sum in the hands of the trustee to which she was entitled. The amount was indefinite and uncertain and could only be ascertained through an accounting. Upon respondent's own theory of the case the cost of her board and clothing for a period of about twenty months must be deducted from the amount in her trustee's hands, and she is entitled to no more than a balance which may remain. To determine that balance it is necessary to examine mutual accounts between herself and her trustee. Her testimony, therefore, discloses that her action is essentially one for an accounting with her trustee. It is true the answer contains no counterclaim, but simply denies the whole transaction. That fact, however, did not change the nature of the action from one for an accounting when the testimony of respondent showed that there was no agreed and liquidated sum in the trustee's hands. The action

must, therefore, be treated as an equity cause and determined as such."

"Where the amount due from the trustee can be ascertained only by an accounting the *cestui que trust* cannot sue at law, but must resort to equity."

22 Enc. Plead. & Prac., 137.

Upon the theory of the defendant in error in this case if the plaintiffs in error violated their contract and refused to take the salmon and pay for them on the 5th of February, 1908, the defendant in error could have adopted one of three remedies:

First: It could have stored and held the salmon subject to the order of the plaintiffs in error and sued for the contract price.

Second: It could have retained the property as its own and recovered the difference between the market value of the same at the time and place of delivery and the contract price, if the market value was less than the contract price.

Third: It could have sold the property after notice to the plaintiffs in error and recovered the difference between the price received and the contract price.

*Schott Co. v. Stone, Fisher & Lane*, 35 Wash., 252.

The defendant in error elected to adopt the third remedy, and in doing so it necessarily assumed and undertook to act as a trustee for the plaintiffs in error and to sell the property in its hands for the best obtainable price. The determination of what price was obtained by the defendant in error involved numerous transactions with various parties and the ascertainment of whether the selling price secured by the defendant in error was the best obtainable price and whether the expenses incurred in making the sale were legitimate, reasonable and proper. All of these matters could only be ascertained and determined by an accounting. They were unliquidated, uncertain and undetermined, and the trustee was required to give to the plaintiffs in error an accounting so that plaintiffs in error might know that the trustee had faithfully performed its duties as such.

Until the case developed, at the time the motion to discharge the jury was made, plaintiffs in error had no means of knowing what disposition the defendant in error had made of the salmon. They did not know and could not know at what price the salmon had been sold. They did not

know and could not know whether the charges for freight, commissions, insurance, cartage, etc., were reasonable and proper, and they were entitled to have a continuance of the cause to investigate the various sales of salmon made by the defendant in error extending over a period of more than one year's duration. Plaintiffs in error were materially injured and damaged by reason of the refusal of the Court to grant the continuance and to assume equitable cognizance of the case, and the action of the lower Court in refusing to grant the motion for the discharge of the jury and the taking of an accounting, and in refusing to grant the continuance, constituted reversible error, and upon this ground the case should have been reversed.

## SECOND ASSIGNMENT OF ERROR.

At the conclusion of the testimony of the defendant in error, E. B. Deming moved for a nonsuit and dismissal of the action for the reason that there was a total failure of proof and that there was no evidence showing or tending to show any liability on the party of said Deming, or showing any claim against him. This motion was denied by the Court. (Record, p. 188.)

From the testimony that we have heretofore quoted it is manifest that there was no evidence of any kind showing or tending to show any liability on the part of E. B. Deming or the Pacific American Fisheries, and this was true at the conclusion of the entire testimony, and the motion for non-suit, as well as the motion for a directed verdict in favor of the plaintiffs in error should have been granted.

## EIGHTH ASSIGNMENT OF ERROR.

The motion of the Deming-Gould Company for a non-suit should have been granted as there was a total failure of evidence to support the allegations of the complaint in regard to said company. The Carlisle Packing Company, if the alleged contract for the sale of salmon was breached by the Deming-Gould Company, could have retained the property as its own and sued for the difference between the market value of same at the time and place of delivery and the contract price, if the market price was less than the contract price, or could have sold the property after notice to the plaintiffs in error and recovered the difference between the price received and the contract price. It

is asserted that the Carlisle Packing Company elected to make a re-sale and sue for the difference between the contract price and the proceeds of the re-sale. The allegations of the complaint do not support this assertion. There is no allegation in the complaint that any notice of any intention to make a re-sale of the salmon and to hold the plaintiffs in error liable for the difference between the contract price and the proceeds of the re-sale. The complaint does not state a cause of action. Neither does the complaint state a cause of action if the defendant in error was suing upon the theory that it retained the property as its own and sought by this action to recover the difference between the market value of the same at the time and place of delivery and the contract price, because it does not make any allegation in its complaint that would bring it within the purview of this contention.

But assuming, for the sake of argument, that the complaint will be deemed amended so as to conform to the proofs. Then the only notice shown by the evidence is the letter of July 2d, 1908, in which the defendant in error notified the Deming-Gould Company that they would sell the salmon and hold it liable for the difference between the contract price and the amount realized on the sale.

We contend that the evidence is wholly insufficient to warrant a recovery against the Deming-Gould Company. The Court will remember that the transaction was terminated on February 5th, 1908. No notice of the proposed resale was given to the Deming-Gould Company until July 2d, 1908, five months after the termination of the business relations concerning the sale of the salmon. The evidence shows that the price at which salmon was held from February until July, 1908, was 90 cents a dozen. Mr. Deming testified that the market price was 80 cents and that sales were made at 80 cents a dozen. Mr. Campbell, a witness on behalf of the defendant in error, stated that the market price was from 70 to 80 cents a dozen, and the holding price, which was the price at which salmon was being held by brokers generally, was 90 cents a dozen, and which was the market price from February until July. If the Carlisle Packing Company intended to make a re-sale and hold the plaintiffs in error liable for the difference between the amount realized on the re-sale and the amount of the contract price, it was its duty to make the election promptly. It could not stand by for a period of five months before

electing to hold the plaintiffs in error liable. The ordinary remedy would be to sue for the difference between the market price and the contract price at the time and place of delivery, and in the absence of an election of a different remedy this is the remedy that the law presumes the plaintiff adopts. Neither the law nor fair dealing will permit a party to withhold his election for a period of five months. He must act promptly. The defendant in error should not be permitted to wait for a period of five months to ascertain whether the price of salmon would advance or whether it would decline. If it advanced, it would be in a position to reap the benefit of an advance; not having made an election to re-sell, if the price declined, as it did, it seeks to hold the plaintiffs in error liable for the decline. In other words, the defendant in error was in this position when plaintiffs in error refused to take the salmon. By not making an election to re-sell, it sought to hold the plaintiffs in error liable for any loss in case of decline, and in case of advance it sought to avail itself of the profits. This is contrary to law and contrary to good morals, and when it appeared that no notice was given of any intention to re-sell

until July 2d, 1908, five months after the transaction was closed, it was the duty of the Court to deny to defendant in error the right to recover.

"An executory agreement which requires a subsequent acceptance of the property by the buyer to consummate the sale, does not become a complete bargain and sale so as to vest the title in him, if he refuses to take the goods. In such case the vendor is entitled to recover damages only to the extent of his actual injury from the failure of the vendee to fulfill his contract, which is ordinarily the difference between the contract price and the market value at the time and place of the breach, with interest. This may be ascertained and fixed by a re-sale within a reasonable time, and after notice to the vendee of the vendor's intention to re-sell, taking all proper measures to secure as fair and favorable sale as possible. Such re-sale is made on the theory that the property is that of the vendee retained by the vendor as a means of realizing the contract price. He acts as the agent of the vendee and deducts from the proceeds all the expenses incurred. After notice of the vendor's intention to re-sell no notice of the time and place of the re-sale is required to be given, but it must be made according to usage of trade."

2 Sutherland on Damages, p. 359.

"As the seller acts as agent for the original buyer, he is held to the same degree of care, judgment and fidelity as an agent in possession of goods with instructions to sell to the best advantage."

35 Cyc., 524.

"To entitle a seller on an executory contract of sale to proceed by re-sale and bind the purchaser by the price obtained and hold him for the loss sustained, instead of proceeding by an action for the entire contract price, the seller must manifest his selection so to proceed by a preliminary notice to the buyer of his intention to re-sell, stating in effect that he will assert his right of re-sale, after which no notice of time and place is required to be given, but it must be made according to the usage of trade."

*Leonard v. Portier*, 15 S. W., 414.

"On a refusal to accept the goods tendered in performance of an executory contract of sale, the seller must give notice of his intention to re-sell in order to bind the purchaser for the difference between the contract price and the price obtained on a re-sale, and notice must be alleged in a petition which demands for such difference."

*Leonard v. Portier, supra.*

There was no notice alleged in this case and no notice was given for five months after the refusal of the vendee to take the salmon. If the defendant in error could have waited five months, why not a year or two years. Why might not it have waited indefinitely, taking the chances, without risk to itself, for an advance in the market?

Aside from this contention there is no compe-

tent evidence tending to show any damages. The only evidence was based upon entries contained in the books of defendant in error, which we think an examination of the record, as we have heretofore contended, will show were improperly and erroneously admitted in evidence.

The motion for non-suit as to the Deming-Gould Company should have been granted.

## FIFTH ASSIGNMENT OF ERROR.

Said Superior Court erred in giving the 9th, 13th and 14th instructions to the jury, and erred in giving each of said instructions to the jury.

"Number 9. If you believe from a preponderance of the evidence that the defendants, or any of them, agreed with the plaintiff to purchase from the plaintiff all of the fish packed by it in 1907, and to pay for the same at the opening prices of the respective grades and kinds thereof, less discounts of 1½% and 5%; and you further find by a preponderance of the evidence that part of the fish so packed was received by the defendants, or such of them as entered into the contract, and that a part was not received nor paid for, as has been agreed upon, but was refused, then I instruct you that in such case plaintiff would have a right to resell the part not so received at the market price thereof, and to sue for and recover from the defendants, or such of them as may have entered into the contract, the difference between what would

have been due the plaintiff for such fish under the contract for the purchase of the same, and any lesser sum obtained by the plaintiff on the re-sale thereof so made."

The instruction as given does not correctly state the law. The jury was instructed that if the contract was made and the defendants refused to accept the salmon the plaintiff had the right to sell the part not so received and recover the difference between the sum realized on the re-sale and the contract price. This instruction is erroneous in that it did not state that before a re-sale could be made it was necessary for the plaintiff to promptly make the election to re-sell and to notify the defendants thereof.

"Number 13. If you believe from a preponderance of the evidence that plaintiff sold to the defendants, or any of them, the 10,903 cases of pink salmon alleged, or any of the same, at the opening prices of the 1907 season, less a discount of 1½ and 5% thereon, and a time for the payment of such price was fixed and agreed upon by the parties, and you further find that defendants refused to accept and pay for such fish at the price so agreed and fixed upon, and you further find that the plaintiff was required to re-sell such fish and did in good faith re-sell the same, at the fair market price thereof as the market then existed; that plaintiff exercised reasonable diligence to sell such fish to the best advantage, and that the price realized was less than the original contract price, then and in

such case you are instructed that the plaintiff would be entitled to recover from the defendants the net difference between what the plaintiff would have received from the defendants under the contract and what it did actually receive from the sales thereof, together with interest on the money which defendants, or defendant, as the case may be, should have paid plaintiff for its fish under the contract, when computed thereon at the rate of 6% per annum from the date when the money should have been paid to this date, subject to credits on account of the re-sales of the fish made by the plaintiff, applied at such time or times as you should find from the evidence that they should be applied. In other words, in such case you would take the contract price of the fish as a basis, compute the interest thereon at the rate of 6% per annum from the day on which the same became due to the day on which the first credit by fish resold by the plaintiff should be given, deduct the amount of this credit from the original sum, take the balance remaining, compute interest thereon from the date of such credit at the same rate until the time when the price of the next re-sale of fish should be credited, deduct such credit and so continue this method of computation until the time all of the said fish were accounted for by plaintiff. The remaining balance and all of the items of interest so computed and found added together would in such case represent the difference between the contract price of such fish and the price received by the plaintiff for the same on the re-sale thereof, together with the interest.

"And in such case, if you find it to be the case, if you should find from a preponderance of the evidence that the plaintiff was required to pay and expend any sum for storage on the fish in con-

troversy, or any sum for insurance on the fish not received and taken under the contract, which were incurred subsequent to the breach of the contract by defendant, and while the plaintiff was diligently and in good faith disposing of such fish on the market, and that such insurance or storage expenses were such as may be reasonably supposed to have been contemplated by the parties to the contract when they made it as the probable results of a breach of the contract by the defendants, or defendant, as the case may be, then plaintiff would also be entitled to recover in this case whatever sums, if any, were paid by it with interest on the same computed at the rate of 6% per annum from the time such storage or insurance charges were so paid."

This instruction eliminated entirely the question of notice to the plaintiffs in error of the intention to re-sell and directs the jury to take into consideration the claims of the defendant in error on account of interest, insurance, warehouse and storage charges, commissions and discounts. The only thing the defendant in error was entitled to recover, if anything, was the difference between the market price of the salmon at the time and place of delivery and the contract price, and in waiting until July 2d, 1908, to give notice of its election to re-sell the defendant in error was precluded from re-selling the salmon for the account of the plaintiffs in error.

"Number 14. If you find by a preponderance of the evidence that a contract was made, and that the defendant or defendants broke the same, as alleged, and that the plaintiff suffered damage thereby, for which it is entitled to recover under these instructions, then I suggest that you adopt the following form of computation in arriving at the sum which the plaintiff should recover: First, find from the evidence the number of cases or dozens of pink salmon the defendant refused to accept from the plaintiff and the net contract price agreed and fixed upon for the same. With this data you would compute the contract price or value of such salmon. Then you would find the net price at which plaintiff re-sold the same fish, deduct the net price received on the re-sale of the fish from the net contract price of the same salmon; to the difference thus obtained add such charges, if any, under these instructions, plaintiff may be entitled to charge on the re-sale of the fish and the interest items, if any, and the amount thus obtained would be the amount of plaintiff's recovery."

The instruction eliminates the question of notice to the plaintiffs in error of intention to re-sell, and directs the jury to take into consideration interest, insurance, warehouse and storage charges, commissions, etc.

## SIXTH ASSIGNMENT OF ERROR.

The Superior Court erred in refusing to give the 1st, 2d and 7th instructions requested by the

plaintiffs in error and in refusing to give each of said instructions.

"Instruction 1. The plaintiff contends that the defendant agreed to purchase from it 10,903 cases of pink flats salmon at $3.60 a case, and that the total amount the plaintiff agreed to pay for said salmon, after allowing 1½% discount and 5% brokerage, aggregated the total sum of $36,786.20, and the plaintiff admits in its pleadings that it realized from the sale of the salmon which the defendants did not take the sum of $30,001.75, and that the difference between the amount received by the plaintiff from the sale of such untaken salmon and the contract price for the same was the sum of $6,784.45; and if you find from the evidence in this case that the defendants agreed to purchase the salmon in question and to pay the opening price for the same, then I instruct you that the plaintiff cannot in any event recover in this action anything in excess of the said sum of $6,784.45.

"This sum is the limit of plaintiff's recovery in this action, in any event, except as to the item of interest about which I shall hereinafter instruct you."

This instruction was more favorable to the defendant in error than it was entitled to have given. It was the duty of the defendant in error to realize, in any event, at least the market price of the salmon. Under no theory of the law was the defendant in error entitled to a commission for realizing the market price.

For the foregoing reasons we ask that the judgment of the Supreme Court of the State of Washington and of the Superior Court of Whatcom County, Washington, be reversed.

Respectfully submitted,

JAMES A. KERR,

E. S. McCORD,

*Attorneys for Plaintiffs in Error.*

# In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

E. B. DEMING, DEMING-GOULD COMPANY, and PACIFIC AMERICAN FISHERIES,

*Plaintiffs in Error,*

vs.

CARLISLE PACKING COMPANY,

*Defendant in Error.*

[illegible] OCT [illegible]

No. 311

In Error to the Supreme Court of the State of Washington

## MOTION TO DISMISS OR AFFIRM AND FOR DAMAGES AND BRIEF ON BEHALF OF CARLISLE PACKING COMPANY

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*Of Counsel.*

(23,002)

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(23,002)

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

| | |
|---|---|
| E. B. DEMING, DEMING-GOULD COMPANY, and PACIFIC AMERICAN FISHERIES, *Plaintiffs in Error,* vs. CARLISLE PACKING COMPANY, *Defendant in Error.* | No. 511. |

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

**Motion to Dismiss or Affirm, and for Damages. Brief and Argument on Same.**

Now come the counsel for defendant in error and respectfully move this honorable court in the alternative to dismiss the writ of error for lack of jurisdiction, or to affirm the judgment of the court below upon the grounds, as appears from the record, that it is manifest that the writ of error was taken for delay only, and that the questions on which the de-

cision of the cause depends, are so frivolous as not to need further argument; and relying on said grounds for a dismissal or affirmance, defendant in error also moves this honorable court for judgment of damages in the sum of $1,270 (being ten per cent. of the judgment in the court below), as well as accrued interest, and its costs and disbursements herein.

This motion is based on rules 6 and 23 of this honorable court.

CHARLES W. DORR,
ALDIS B. BROWNE,
*Attorneys for Defendant in Error.*

S. M. BRUCE,
HIRAM E. HADLEY,
*Of Counsel.*

## STATEMENT

This action was brought in the Superior Court of Whatcom County, Washington, by defendant in error, Carlisle Packing Company, a corporation, as plaintiff, against plaintiffs in error, E. B. Deming, Deming-Gould Company, and Pacific American Fisheries, as defendants, to recover in damages for breach of contract (Complaint, R. 1-4).

Plaintiff and defendant Deming were residents and citizens of the State of Washington; Deming's co-defendants were non-resident corporations. All of the defendants appeared generally, and interposed a joint answer in form of general denials, challenging all the allegations of the complaint, with respect

to the making of the alleged contract, its breach, and the damages claimed thereunder (Answer, R. 4-6).

Thereafter, without objections, the cause proceeded to trial before the court and jury. During the progress of the trial, after considerable evidence had been adduced, the defendants moved the court to discharge the jury and proceed with the case as for an equitable accounting; the motion was overruled (R. 45-46). Thereupon, the defendants moved for a continuance, which latter motion was likewise denied (R. 46).

At the conclusion of plaintiff's case in chief, each of the defendants separately moved the court for a non-suit, each of said motions being by the court denied; defendants then proceeded to introduce their evidence in defense (R. 188-189).

After all the evidence had been introduced before the jury, including the evidence in chief in support of plaintiff's cause of action, the evidence of the defendants in defense, and the evidence of plaintiff in rebuttal, the defendants Deming-Gould Company and Pacific American Fisheries offered a petition and bond for removal of the suit to the United States Circuit Court for the Western District of Washington, upon the ground of diverse citizenship, which said petition was denied by the presiding judge, and the trial proceeded (R. 243). No transcript was ever filed in the federal court, and no attempt was made to bring the matter to the attention of that court.

The petition for removal admitted that the defendant E. B. Deming was a resident and citizen of

the State of Washington, but alleged, as the sole ground for the right to remove, that he was not a proper party to the action, but was fraudulently, improperly and wrongfully joined for the sole and only purpose of depriving the federal court of jurisdiction, and preventing his co-defendants—two non-resident corporations—from removing the cause to the United States Circuit Court.

The petition further admitted that upon the face of the complaint and record at the time of the commencement of the trial, no ground for removal appeared, but it was claimed that from the testimony which had been adduced on the trial, it was made to appear that Deming was not connected with the transaction except in a representative capacity, and was not therefore a proper party (Petition for Removal, R. 12-14).

After the petition was denied, counsel for defendants moved for judgment in favor of defendant Deming notwithstanding the evidence. The motion was denied (R. 243).

A similar motion was then made on behalf of defendant Pacific American Fisheries. The motion was likewise denied (R. 243-244).

A motion was then made for an instructed verdict in favor of the defendant Deming-Gould Company. The motion was denied (R. 244). See also order of court denying petition for removal and denying the last three mentioned motions (R. 6-7).

Counsel, on behalf of all defendants, then requested the court to charge the jury, and submitted

elaborate requested written instructions upon their theory of the case (R. 17-24).

Whereupon, the court instructed the jury (R. 244-253).

Counsel for plaintiff and counsel for defendants then argued the case to the jury, after which the jury retired to consider their verdict (R. 253).

A verdict was returned by the jury for plaintiff and against all of the defendants (R. 7).

Judgment was rendered and entered on the verdict against all the defendants (R. 7-8).

A motion for a new trial was interposed on behalf of all the defendants. The motion was overruled (R. 8-10).

An appeal was taken to the State Supreme Court, and the judgment of the lower court was there affirmed against all the defendants (Opinion of Supreme Court of State of Washington, R. 256-261).

A petition for rehearing in the State Supreme Court was denied (R. 261).

And final judgment of affirmance entered (R. 262).

Defendants in the court below (plaintiffs in error here) have, by writ of error, brought the case to this court, and have specified eleven assignments of error (R. 264-266).

There is, however, involved in this proceeding but one simple proposition of law, i. e., whether the state court erred in retaining jurisdiction of the action after the petition and bond for removal was filed.

## ARGUMENT

Assignments of error numbered 1, 2, 4, 5, 6, 8 and 9 (R. 265-6), relate exclusively to matters of practice in the state court, and will not be noticed here.

Questions relating to state practice are not reviewable in the Supreme Court of the United States on writ of error to a state court.

> *Buena Vista County v. Iowa Falls & S. C. Ry. Co.*, 112 U. S. 165, 177.
> *Renaud v. Abbott*, 116 U. S. 277, 281-2.
> *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 688.
> *Scranton v. Wheeler*, 179 U. S. 141, 151-2.

The granting or refusing of a motion for new trial is a matter of discretion which is not reviewable on writ of error.

> *Smith v. Mississippi*, 162 U. S. 592, 601-2.

Assignment numbered 3 challenges the action of the trial court in retaining jurisdiction after the filing of the petition and bond for removal, and is as follows:

"3. In denying the petition of the plaintiffs in error for a removal of the cause to the United States Circuit Court for the Western District of Washington, it appearing from the record at the time said petition was made that no evidence had been introduced showing or tending to show that either E. B. Deming or the Pacific American Fisheries had ever made any contract of any kind with the defendant in error with reference to the purchase of the salmon in question, said petition for removal being based

upon the ground of diversity of citizenship, Deming-Gould Company being an Illinois corporation and a resident and citizen of Illinois, the Pacific American Fisheries being a Maine corporation and a resident and citizen of Maine" (R. 265).

The remaining assignments of error 7, 10 and 11 (R. 265-266), all involve the question of the denial by the trial court of the application for removal at the time and in the manner attempted, and under the circumstances, as shown by the record, and the affirmance thereof by the State Supreme Court.

## THE MOTION TO DISMISS

In support of the motion to dismiss, our contention is:

(A) That there is no Federal question involved in the case.

(B) That if there be a Federal question involved in the case, it is not "a real substantive question" sufficient to warrant this court in assuming jurisdiction.

### A

In affirming the refusal of the Superior Court to allow defendants' petition for removal, the Supreme Court of Washington said (R. 260):

"At the close of all evidence in the case the defendants Deming-Gould Company and Pacific American Fisheries filed a petition and bond for the removal of the case to the United States Circuit Court, upon the ground of diverse citizenship of the parties. It was contended then, and it is argued now, that de-

fendant Deming, being a resident, was not made a party in good faith, but was made such party defendant solely for the purpose of depriving the United States circuit court of jurisdiction over the subject matter of the action. We have held above that defendant Deming was a proper party. That ruling disposes of this question."

And in holding that Deming was a proper party, that Court said (R. 259):

"At the close of the plaintiff's evidence, counsel for defendants moved for a nonsuit as to the defendant Deming and as to the Pacific American Fisheries, upon the ground that there was no evidence to connect these two defendants with the contract sued upon; and again, at the close of all the evidence in the case, counsel moved for a directed verdict as to the defendant Deming. These motions were denied, and each of these rulings of the court is assigned as error. These errors are argued separately in the brief, but they all depend upon substantially the same state of facts. It was conceded that Mr. Deming was the vice-president of the Pacific American Fisheries and managing agent of the Deming-Gould Company, and had authority to bind these companies by such contracts. Mr. Wright, who was the managing agent for plaintiff, testified that while nothing was said about the matter except that Mr. Deming was to give him orders for fish pro rata with the Pacific American Fisheries, he understood that the contract was to be made with the Deming-Gould Company, but that he was dealing with Mr. Deming personally, and relied upon him. At the time the contract was made, Mr. Deming agreed to reduce the same to writing, but this was never done. All of the fish which was delivered under the contract was delivered and shipped upon Mr. Deming's order. Mr. Deming was in full control of the business of the other two defendants, and their responsible head. It was within his hands at the time the contract was made to make the con-

tract definite in regard to who were the responsible parties thereto, by simply reducing the same to writing as he had agreed to do.

"At the time the action was begun, the plaintiff, not knowing which one of the defendants was responsible, made all three of them defendants. When the answer was filed, all of them joined therein and made a joint answer containing general denials only. If the defendant Deming desired to deny that he made the contract for himself personally or for the Pacific American Fisheries, that fact should have been set up in the answer. When all joined in the answer, they thereby took issue upon the facts jointly, and if the contract alleged was proved, all were necessarily bound jointly."

In other words, the Court held, in effect, that by making a joint answer going to the merits of plaintiff's cause of action, instead of setting up therein that Deming was not a proper party defendant, but was fraudulently made a defendant in the case to oust the Federal court of jurisdiction, the plaintiffs in error *waived* whatever right they may have had to have the case removed from the state court.

The decision of a state court that a Federal right has been waived, does not, under the settled practice of this court, raise a Federal question, for the simple reason that *such a decision does not involve the denial of a Federal right, but admits the existence of the Federal right*, which, however, because of the action or inaction of a party, is held to have been lost, and for the further reason that such a holding is based upon a finding of *fact* and not of *law*. Whether the

decision of the state court to the effect that there has been a waiver of the Federal right claimed is well founded or not, makes no difference, and creates no Federal question reviewable in this court.

*Beaupre v. Noyes*, 138 U. S. 397, 401.
*Eustis v. Bolles*, 150 U. S. 361, 369-370.
*Rutland R. R. v. Central Vermont R. R.*, 159 U. S. 630, 640.
*Gillis v. Stinchfield*, 159 U. S. 658, 660.
*Seneca Nation v. Christy*, 162 U. S. 283, 289.
*Pierce v. Somerset Ry.*, 171 U. S. 641, 648, 649, 650.
*Leonard v. Vicksburg, etc., R. R. Co.*, 198 U. S. 416, 422, 423.

This doctrine is thus succinctly stated in the opinion of Mr. Justice Peckham, in *Pierce v. Somerset Railway, supra:*

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one."

Even admitting that the decision of the Supreme Court of Washington denied to plaintiffs in error a right claimed under a Federal statute, nevertheless, inasmuch as the record clearly shows that plaintiffs in error did in fact waive whatever right to remove they may have had, and inasmuch as this alone is sufficient to sustain the decision of that court, there

is no Federal question involved in the case; for it is well settled that in order to sustain the jurisdiction of this court, *it must appear that the decision of the Federal question claimed to be involved in the case, was necessary to the determination of the cause.*

*Railroad Company v. Rock*, 4 Wall. 177, 180-181.

*Murdock v. City of Memphis*, 20 Wall. 590, 634-635.

*Johnson v. Risk*, 137 U. S. 300, 307, 309.

*Cook County v. Calumet & Chicago Canal & Dock Co.*, 138 U. S. 635, 651.

*Eustis v. Bolles*, 150 U. S. 361, 366, 367.

Speaking for the Court in the last mentioned case, Mr. Justice Shiras said (p. 366):

"It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, *but that its decision was necessary to the determination of the cause*, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it."

In *Johnson v. Risk*, *supra*, defendants below demurred on two grounds, one of which involved the construction of the bankruptcy act of March 2, 1867, and the other, the bar of the statutes of limitation of the State of Tennessee. No opinion was given by the Supreme Court of that State, and the record disclosed no specific statement of the ground upon which

the Court proceeded. In dismissing the writ of error, Mr. Chief Justice Fuller said (p. 309):

"Inasmuch, therefore, as, if the Supreme Court of the State has sustained the defense of the statutes of limitation, we cannot perceive that such decision would have been erroneous, it does not appear that the judgment as rendered could not have been given without deciding the federal question, or that its decision was necessary to the determination of the cause and that it was actually decided."

This case shows that the fact that the lower court does not pass upon the non-Federal ground at all is of no importance, where it appears that the court might have properly disposed of the case on that ground and without reference to the Federal question in the case.

We are thus brought directly to a consideration of this question: Does the record show that plaintiffs in error, by their conduct, waived their right to have the case removed to the Federal court—a non-Federal question? If so, then the writ of error should be dismissed under the authorities just cited, because the case may be made to turn upon a question which this court is without jurisdiction to review. We contend that this question should be answered in the affirmative, and that consequently the writ of error should be dismissed.

It is certainly a well settled principle of practice that a party entitled by right to remove a cause from the state to the Federal court, may waive such right. One cannot deny the jurisdiction of the court, and,

at the same time, invoke affirmative relief from the court. The defendants in the court below moved the trial court to discharge the jury, and to try the case as an accounting in equity (R. 45-46). Failing in this, they moved the court for a continuance (R. 46). Should it be argued that these demands for affirmative action occurred before all of the plaintiff's evidence was in, and defendants were not therefore fully advised as to all the testimony tending to charge Mr. Deming as a party to the contract, no such contention can be made with respect to the state of the record when the defendants, after plaintiff's case in chief had been closed, after plaintiff had rested, each then severally moved the court to grant them a judgment of non-suit (R. 188-189). Here was a demand for judgment of dismissal in favor of all the defendants after plaintiff had rested, and a demand, had it been granted, that would have ended the case in that court by a final adjudication. Plaintiff must, at that point, have established its *prima facie* right to recover against all the defendants, or there must have been a failure of proof against one or more of them; the court held there was a *prima facie* case against all of them, and denied the several motions for non-suit. If any right of removal had theretofore existed, it was waived by defendants in submitting themselves to the jurisdiction of the court and demanding judgment, and it was cut off by the court in entertaining and adjudicating those demands. A litigant should not be permitted to experiment with a court by demanding a judgment at

its hands, and that failing, then to challenge the jurisdiction of the court.

But if the right of removal still existed at the time the petition was filed, such right was thereafter waived by defendants by invoking further affirmative relief from the trial court, including the several motions made near the conclusion of the trial, after the evidence was all in, for judgments notwithstanding the evidence, and for a directed verdict (R. 243-244), the requests for instructions to be given to the jury (R. 17-24), the argument of the case to the jury (R. 253), and the motion for a new trial (R. 8-9).

The petition for removal alleges:

"that at the time the plaintiff finally rested its case it manifestly appeared that the defendant E. B. Deming, had been improperly made a party to said suit, and for the purpose of holding and confining said action to this court, and to deprive the federal court of jurisdiction of the subject matter and the parties to this action" (R. 13).

Assuming—but not conceding—that the allegations in the petition were legally sufficient, and made a *prima facie* showing for removal, the petition should have been filed, under the theory therein set forth, immediately after the close of plaintiff's testimony in chief. This was not done, but each defendant separately moved for a judgment of nonsuit, which, being denied (R. 188-189), they then proceeded with their case in defense, and offered their evidence; and finally, after all the evidence was in, the petition for removal was brought in.

Plaintiffs in error certainly waived any right to remove, under their own theory, by not filing their petition at the close of plaintiff's testimony in chief.

But back of all this, they waived their right to petition for a removal the moment they submitted themselves to the jurisdiction of the state court for the determination of any of the issues of law or fact. The right to remove cannot be invoked after a party has experimented with his case in the state court and met with difficulties there.

*Removal Cases*, 100 U. S. 457, 473.
*Alley v. Nott*, 111 U. S. 472, 476.
*Fisk v. Henarie*, 142 U. S. 459.

The rule is firmly established by the decisions of this court that the right to remove from the state court to the United States court is waived when the petitioner has made any previous attempt to obtain a decision from the state court on the merits.

In the case of *Manning v. Amy*, 140 U. S. 137, the defendant filed a motion to dismiss and a plea in abatement, and afterwards, before said motion and plea were disposed of by the trial court, defendant filed a petition and bond for removal to the United States Court, which was construed by the court (p. 141) to be a

"mere conditional application for removal in case the court, after consideration of the motion to dismiss and the plea in abatement, should overrule both."

This court said further (p. 141):

"The avowed purpose of the defendant in the proceedings was to have the state court retain jurisdiction for the purpose of getting a judgment in his favor, and not to have the case removed unless the judgment went against him. It is clear that Congress did not, by the act of March 3, 1875, intend to allow the defendant to 'experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal.' *Removal Cases*, 100 U. S. 457, 473. Such a proceeding was not authorized by that act. We hold, therefore, that the proceedings in the state court on the 29th of December, 1884, did not have the effect to remove the cause to the Federal Court."

The language of Judge Green, in *Hudson River Railroad & Terminal Co. v. Day*, 54 Federal 545, is very convincing; he sums up this proposition as follows (p. 547):

"I think that Mr. Day, in choosing the state tribunal for the protection of his rights, has waived his right to remove his cause to the federal tribunal. He cannot proceed tentatively in either court. He must make his selection. If he chooses to rest the protection of his rights with the state tribunal, he cannot afterwards seek to delay or embarass the final determination of the his case by appealing to the federal tribunal."

The act of 1875 provided that the petition to remove a suit must be filed "before the trial thereof," and in the *Removal Cases*, 100 U. S. 457, it was construed as follows (p. 473):

"We agree that, as a general rule, the petition must be filed in a way that it may be said to have been in law presented to the court before the trial is in good faith entered upon. There may be exceptions to this rule; but we think it clear that Congress did

not intend, by the expression 'before trial,' to allow a party to experiment on his case in the state court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal. But, to bar the right of removal, it must appear that the trial had actually begun and was in progress in the orderly course of proceeding when the application was made. No mere attempt of one party to get himself on the record as having begun the trial will be enough. The case must be actually on trial by the court, all parties acting in good faith, before the right of removal is gone."

The law of 1887, as re-enacted in 1888, which was in force at the time of the trial in the state court (April-May, 1910) is much narrower in its scope than the law of 1875, and was passed for the purpose of restricting the jurisdiction of the United States Courts.

*Smith v. Lyon*, 133 U. S. 315, 319.
*Fisk v. Henarie*, 142 U. S. 459, 467.

How can it be argued that the petition can be filed after the case has gone to trial on the merits, and after the defendants have submitted themselves to the jurisdiction of the court, when such a proceeding was not allowed under the older and broader law?

*Removal Cases, supra.*
*Jifkins v. Sweetzer*, 102 U. S. 177, 179.

To allow a defendant, as was attempted in the case at bar, to proceed with a trial to the point of demanding judgment of non-suit on the merits, after plaintiff's case was in, and, being unsuccessful, to continue with the trial, submit his own case in de-

fense, and thereafter oust the court of its jurisdiction by filing a removal petition, supported merely by his own declaration to the effect that the decision of the court, in holding that a *prima facie* case had been made out against him, was wrong, would be to authorize the interruption of the orderly proceeding of law suits, and to impede the administration of justice in a manner never contemplated by Congress when passing any of the removal acts.

The mere suggestion of the proposition should be sufficient to bring down upon it the righteous condemnation of this court.

The contention that no Federal question is involved in the case is made clearer by a consideration of the nature of the grounds urged by plaintiffs in error as sufficient to sustain their alleged right to removal. The petition for removal (R. 12-14) sets out as grounds for removal: (a) that Deming was made a party defendant, "fraudulently and improperly, and wrongfully for the sole and only purpose of depriving the United States Circuit Court for the Western District of Washington of jurisdiction" and preventing a removal of the cause to that court; (b) that no contract was ever made by the plaintiff below and Deming, acting in his own behalf, and that therefore Deming was not a proper party defendant. Even though in a narrow sense the decision of the court be considered as denying to plaintiffs in error a Federal right, nevertheless, inasmuch as the Court must have found against both of the above claims to sustain its decision, and inasmuch as further, these

claims are in respect to matters not reviewable here, this court is without jurisdiction. The decision of the Court that Deming was not made a party defendant "fraudulently and improperly, and wrongfully" was merely a finding of fact. The decision of the Court that Deming was a real party to the contract sued on and in negotiating the same did not act merely as the agent of the other plaintiffs in error, was a finding of law, but of the law of Washington, the *locus celebrationis* of the contract, and involved no Federal question. Under these circumstances, we submit that there is no reviewable question in the case.

*Mining Co. v. Boggs*, 3 Wall. 304, 310.
*Eilers v. Boatman*, 111 U. S. 356.
*Crary v. Devlin*, 154 U. S. 619.
*Telluride Power Co. v. Rio Grande, etc., Ry.*, 175 U. S. 639, 645, 646, 647.
*Telluride Power Co. v. Rio Grande Ry.*, 187 U. S. 569, 579.
*McMillen v. Ferrum Mining Co.*, 197 U. S. 343, 347.

In *Telluride Power Co. v. Rio Grande, etc., Ry.*, 175 U. S. 639, the defendant invoked, as a defense, Rev. Stat., section 2339, providing that whenever "by priority of possession" rights to the use of water for mining purposes have vested and accrued, and the same are recognized by local customs and laws, "the possessors and owners of such vested rights shall be maintained and protected in the same." This court, through Mr. Justice Brown, held (p. 645):

"But in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the plaintiff. The question who had acquired this priority of possession was not a Federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by the local customs, laws and decisions, all of which were questions of state law."

And again (p. 646):

"It is quite evident that these findings involved either questions of fact or questions of local law, and that while the finding of the ultimate fact of prior possession may possibly have been a legal conclusion, it was not a Federal question."

By way of conclusion, the Court added (p. 647):

"But the difficulty in this case is that, before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions. These were local and not federal questions. *The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a Federal question.*"

B.

But admitting for purposes of argument that a Federal question is involved in the case, that question

is so wholly devoid of merit and has been so explicitly foreclosed by the decisions of this court as to leave no room for real controversy in the matter. To warrant this court in assuming jurisdiction of a case, the Federal question asserted to be involved therein must be "a real substantive question."

*Millingar v. Hartupee*, 6 Wall. 258, 261.
*New Orleans v. N. O. Water Works Co.*, 142 U. S. 79, 87.
*Hamblin v. Western Land Co.*, 147 U. S. 531, 532.
*St. Joseph & Grand Island R. R. Co. v. Steele*, 167 U. S. 659, 662.
*Wilson v. North Carolina*, 169 U. S. 586, 595.
*New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 344, 345, 346.
*Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311, 314, 315.

In the case last cited, Mr. Chief Justice White laid down the rule as follows (p. 311):

"'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real and not a merely formal Federal question is essential to the jurisdiction of this court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

Inasmuch as the motion to affirm is based upon the frivolous nature of the Federal question alleged to be involved, this aspect of the case will be dealt with thereunder.

## THE MOTION TO AFFIRM

In support of our motion to affirm, our contention is that it is patent, on the face of the record, that the right of removal never existed in this case.

Defendant in error sued the plaintiffs in error jointly, alleging the existence of one common contract with each and all of them (paragraphs 3 and 4, Complaint, R. 2). Defendants in the court below filed one joint answer denying the existence of any contract (paragraphs II and III, Answer, R. 5). The issue of fact was thus squarely raised as to whether there was any contract between the plaintiff and any of the defendants. All the defendants raised the issue of *non assumpsit* by their joint answer; the primary issue of fact to be tried out was whether there was a contract, and if so, with whom it was made; the incidental issues were whether the contract, if there was one, had been breached, and the amount of damages resulting therefrom. Those simple issues of fact were resolved against all of the defendants by the state courts, and it does not now lie with any of them, after the jury, the *nisi prius* court, and the court of last resort of the state, all have found that each was a proper party and each is liable for the breach of the contract, to say that either of them was fraudulently sued.

Those issues of fact have been adjudicated by the state courts in favor of defendant in error and against E. B. Deming six times—first, by the trial court in denying Deming's motion for a non-suit at the close of plaintiff's case (R. 188-189); second, by the trial court in denying Deming's motion for judgment notwithstanding the evidence (R. 243); third, by the jury who heard the evidence and returned a verdict against all of the defendants, including Deming (R. 7); fourth, by the trial court in denying defendants' motion for a new trial and entering judgment against all of them (R. 9-10); fifth, by the State Supreme Court in affirming the judgment of the trial court (R. 256-261); sixth, by the State Supreme Court in denying defendants' petition for a rehearing (R. 261).

Furthermore, if either of the original defendants was liable, they were all liable under their joint answer. This point is foreclosed against plaintiffs in error by the opinion of the State Supreme Court in the case at bar, with respect to the question of practice. We quote (R. 259):

"When the answer was filed, all of them joined therein and made a joint answer containing general denials only. If the defendant Deming desired to deny that he made the contract for himself personally or for the Pacific American Fisheries, that fact should have been set up in the answer. When all joined in the answer, they thereby took issue upon the facts jointly, and if the contract alleged was proved, all were necessarily bound jointly.

*1 Ency. Pl. & Pr.*, p. 861.

*Ex parte Lowman & Hanford, etc., Co.*, 2 Wash. 427."

Ordinarily a petition for removal must be filed

"at the time, or at any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

Act of March 3d, 1887, Sec. 3, 24 Stat., p. 554.

The filing of a petition showing a *prima facie* cause for removal, within the time provided by statute, accompanied by a bond, operates in itself to remove the cause to the United States Court.

In certain cases in which no ground for removal exists at the time of commencing the action, amending the complaint or dismissing the action as to certain defendants so alters the controversy as to make it removable. It has been held that a petition filed when these changes were effected, was not too late, but this is not such a case.

The petition was not filed at or before the time within which the defendants were required to answer, the pleadings were never amended to change the nature of the controversy, there was no change of parties, but the defendants attempted to bring their case within the foregoing exception to the rule by alleging in their petition that the evidence showed that E. B. Deming was improperly joined as a defendant because plaintiff had failed to make out a case against him. This was merely their assertion;

it was repudiated by the jury and by both state courts. If defeated defendants were permitted to escape by setting up their *ipse dixit* against verdicts of juries and judgments of courts, it would be idle to pursue delinquent debtors in courts of justice.

The state court can inquire whether, as a matter of law on the face of the record, including the declaration or complaint, petition and bond, there exists a right of removal.

> *Stone v. South Carolina*, 117 U. S. 430, 432.
> *Burlington etc. Ry. Co. v. Dunn*, 122 U. S. 513, 516.

The state court also has the right to satisfy itself that the petition is filed in time.

> *Kansas City etc. R. R. Co. v. Daughtry*, 138 U. S. 298.

In denying the petition for removal in the case at bar, the trial judge said:

"The petition will be denied. Your motion for a non-suit was denied on the ground the Court thought there was evidence here that ought to be submitted to the jury, and I do not know of anything that has come up to change the situation in your defense" (R. 243).

The State Supreme Court disposed of the questions involved in the removal petition as follows:

"At the close of all evidence in the case the defendants Deming-Gould Company and Pacific American Fisheries filed a petition and bond for the removal of the case to the United States Circuit Court, upon the ground of diverse citizenship of the parties.

It was contended then, and it is argued now, that defendant Deming, being a resident, was not made a party in good faith, but was made such party defendant solely for the purpose of depriving the United States Circuit Court of jurisdiction over the subject matter of the action. We have held above that defendant Deming was a proper party. That ruling disposes of this question" (R. 260).

So both state courts held that there was sufficient evidence against the defendant Deming to send his case to the jury.

In presenting this question to the Supreme Court of Washington, counsel for plaintiffs in error cited and relied upon *Powers v. Ches. & Ohio Railway Co.*, 169 U. S. 92; but this is an authority against their right to remove this case to the United States Circuit Court. In that case, two removals were attempted: the first one involved the same element that is claimed here, i. e., fraud in joining defendants, but the position was far stronger than in the case at bar, even if we look no further into the record than to the petition for removal, tendered in the instant case at the conclusion of the taking of the evidence.

In the Powers case, the first petition was timely filed, before the return day; it alleged a fraudulent and improper joinder of defendants, for the purpose of defeating the defendant railway company's right of removal. A transcript was filed in the United States Circuit Court, and *after a hearing*, a motion to remand was sustained and the case was sent back to the state court. This court approved and sustained the remanding order in the following language,

quoted from its former decisions cited in the opinion (p. 97):

"'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' "

A year later, plaintiff voluntarily dismissed his suit against the resident defendants. This Court sustained the second effort to remove the case, notwithstanding the statutory time within which to file the petition had passed, upon the ground that the application came at the earliest opportunity after the resident defendants had been dismissed, which was as soon as the action assumed the shape of a removable case, in the court in which it was brought.

In the suit at bar, the plaintiff never dismissed the resident defendant (Mr. Deming) and the case has never assumed the shape of a removable cause. There is no analogy between the branch of the Powers case on the second petition for removal and the case at bar, but the analogy is perfect between that branch of the Powers case relating to the first proceeding for removal and the attempted proceeding in that respect, as shown by the record in the present action, and the decision is squarely against the contentions of plaintiffs in error, as disclosed by their assignments of error.

Where the complaint alleges joint liability, even separate answers urging separate defenses do not make separate controversies which are removable. The plaintiff, having alleged a joint liability, has the right to prosecute the action to final conclusion on that theory.

In *Louisville & Nashville R. R. Co. v. Ide*, 111 U. S. 52, 56, the Court said:

"On the one side of the controversy upon that cause of action is the plaintiff, and on the other all the defendants. The separate defenses of the defendants relate only to their respective interests in the one controversy. The controversy is the case, and the case is not divisible."

To the same effect are the following cases:

*Pirie v. Tvedt*, 115 U. S. 41, 43.

*Plymouth Min. Co. v. Amador Canal Co.*, 118 U. S. 264, 270.

*Railway Co. v. Thompson*, 200 U. S. 206, 216.

*C. R. I. & P. Ry. Co. v. Willard*, 220 U. S. 413, 425.

Not even a separate defense was interposed in the case at bar.

We respectfully submit that there is no Federal question involved in this case; that if there be a Federal question in the case it is so devoid of merit and "has been so evidently foreclosed by the decisions of this court as to have no real room for controversy"; that it is clear from the record that the right of removal never existed in this case; that if the right of

removal ever existed it was frequently waived by plaintiffs in error; and that the writ of error was manifestly taken for delay only.

Respectfully submitted.

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*Of Counsel.*

the state court to remove the cause as to the non-resident defendants on the ground of fraudulent joinder of the resident defendant and is frivolous as shown by the fact that the trial court refused to nonsuit as to the resident defendant and there was a verdict against all.

Where the case is not removable before trial, plaintiff has the right to have the issues of fact and law raised determined in the state court having jurisdiction, and the power of the state court to so determine cannot be destroyed by defendants' claim that if the evidence had been rightly weighed the decision would have been different.

Where the state court has jurisdiction, the Federal court cannot deny the state court the right to exercise it.

The unsubstantial and frivolous character of the only Federal question presented in this case embraces the conclusion that the writ was prosecuted for delay.

The power which this court can exercise under one of its own rules depends upon the statute on which the rule is based.

Under Rule 23, which is based on § 1010, Rev. Stat., this court has the same power to award damages for delay where the writ of error is dismissed as where there is judgment of affirmance; and in this case five per cent. damages are imposed in addition to costs.

Writ of error to review, 62 Washington, 455, dismissed.

THE facts, which involve the jurisdiction of this court of writs of error to state courts, and the power of this court to award damages for delay where the writ of error is dismissed, are stated in the opinion.

*Mr. Charles W. Dorr*, *Mr. A. B. Browne*, *Mr. S. M. Bruce* and *Mr. Hiram E. Hadley*, for defendant in error, in support of the motion.

*Mr. James A. Kerr* and *Mr. E. S. McCord*, for plaintiff in error, in opposition thereto.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The Carlisle Packing Company, a corporation of the State of Washington, sued in a court of that State Deming and the two corporations who with him are the plaintiffs in error on this record. Deming was a citizen and resident of the State of Washington and the corporations were

alleged to be citizens of States other than Washington. The defendants were sued jointly for a violation by them of a contract alleged to have been jointly made for the purchase of salmon. There was a joint answer by the defendants putting at issue the material allegations of the complaint. There was a jury trial. When the Carlisle Company rested, motions for nonsuit were separately made on behalf of each of the defendants and overruled.

After the defendants had offered their proof and the case was ripe for submission, the counsel for the two corporate defendants presented a petition and bond for the removal of the cause to the proper Federal court and asked that the bond be approved and further proceedings be stayed. The asserted right to remove proceeded upon the assumption that Deming had been fraudulently joined as a defendant for the purpose of preventing the two non-resident defendants from removing the case. This was supported by the contention that the proof as offered left no doubt that Deming had made the contract declared on merely as the agent of the two corporations and was therefore not personally bound. In denying the petition to remove, the trial judge directed attention to the fact that the motion made at the close of the plaintiff's proof for a nonsuit in favor of Deming had been denied because the court was of opinion that there was evidence to go to the jury on the question of the liability of that defendant and further observed that the situation in this respect had not been altered by the testimony introduced for the defendants. The cause was submitted to the jury upon instructions which, among other things, left it open to find against less than all of the defendants if the jury believed that the contract had not been made with all. There was a verdict for the plaintiff against all the defendants, and a judgment entered thereon was affirmed by the Supreme Court of the State. 62 Washington, 455. The appellate court, among other things, decided that no

error had been committed in overruling the motions for nonsuit and in denying the petition to remove, and in substance held that the plaintiff had the right to join Deming as a party defendant.

The prosecution of this writ of error is based upon the assumption that a Federal question was involved in the refusal to grant the petition for removal. In view, however, of the well settled and indeed now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous we think it is our duty to grant a motion to dismiss which has been here made. We reach this conclusion because the case was not a removable one when it was called for trial. Not being removable before trial, the plaintiff had the right to have the issues of fact and law raised determined in the state court which had jurisdiction over the cause. This power could not be destroyed by the mere act of the defendants, or one of them, in asking a removal based upon the assumption that if the evidence in the case was properly weighed and the legal principles applicable were correctly applied there would result a condition from which a right to remove would arise. On its face the assertion of such a right involved two propositions, whose unsubstantial character is made manifest by their mere statement: *a.* that the state court had jurisdiction over the cause, but had no right to exercise that jurisdiction; *b.* that a Federal court could endow itself with jurisdiction over a cause to which its authority did not extend by disregarding the pleadings and wrongfully assuming the right to revise the decision of the state court on matters of an absolutely non-federal character which that court had the right to decide. Nor is there force in the suggestion that the right to remove under the circumstances stated finds support in the ruling

in *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, since in that case a separable controversy on the face of the record arose at the opening of the trial consequent on the discontinuance by the plaintiff of his action as against the resident defendant whose joinder had up to that time made the action non-removable. The difference between that case, and the one here presented is apparent and at the time the petition for removal was presented and this writ of error was sued out had been pointed out in decisions of this court. *Whitcomb* v. *Smithson*, 175 U. S. 635; *Alabama Southern Ry.* v. *Thompson*, 200 U. S. 206, 217; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308.

Dismissing the writ of error, as we shall therefore do for the reasons stated, it remains to consider whether we should grant a prayer for damages for delay which has been made. That the unsubstantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is in our opinion indubitable. Does the power to award damages for delay exist where a writ of error is dismissed because of the unsubstantial and frivolous character of the asserted Federal right and the conclusive inference that the writ was prosecuted for mere delay which arises from sustaining such ground for dismissal? is then the question. That the comprehensive text of rule 23, embracing as it does "all cases" where a writ of error shall appear to have been sued out for mere delay, brings this case within its purview is obvious. But as the power which the rule expresses depends upon Rev. Stat., § 1010, we must consider the subject in the light of the statute. The power conferred is to impose damages for delay in cases "where, upon a writ of error, judgment is affirmed in the Supreme Court. . ."

It has been decided that where there was no power on a motion to dismiss to consider whether a case was prosecuted for delay only that a prayer for dismissal on such

ground could not be allowed and damages could not be awarded. *Amory* v. *Amory*, 91 U. S. 356. But the mere statement of the doctrine demonstrates that it rested upon the obvious proposition that a decree would not be made to embrace subjects which the court was not empowered to consider in determining whether the relief asked for should be awarded. This doctrine has no application here since by a line of cases announced subsequent to the decision in *Amory* v. *Amory*, it has come to be settled that on a motion to dismiss it is the duty of the court to consider whether an asserted Federal question is devoid of merit and unsubstantial either because concluded by previous authority or because of its absolutely frivolous nature, and if it is found to be of such character to allow a motion to dismiss. This being true as the conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous the duty to affirm results.

We have then this situation, the finding that a particular ground—that is, the frivolity of the Federal question—exists indifferently justifies either a judgment of affirmance or an order of dismissal. *Chanute City* v. *Trader*, 132 U. S. 210; *Richardson* v. *Louisville & N. R. Co.*, 169 U. S. 128; *Blythe* v. *Hinckley*, 180 U. S. 333, 338; *New Orleans Water Works Company* v. *Louisiana*, 185 U. S. 336, 345; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308. The want of substantial difference between the two, as well as the rule which should determine the practice to be followed in awarding, in such a case, one or

the other, either affirmance or dismissal, was pointed out in the *Equitable Case*. Thus, the court said (187 U. S. 314):

"From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. . . . It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in *Chanute* v. *Trader*, *Richardson* v. *Louisville & N. R. Co.* and *Blythe* v. *Hinckley*, *supra*. This being the case, it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect, to finally dispose of this controversy. . . . As this is a case governed by the principles controlling writs of error to state courts, it follows that the Federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing, that is, the two questions are therefore absolutely coterminous. Hence,

in reason, the denial of one of the motions necessarily involves the denial of the other, and hence also one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other."

Stating that in such a case the determination whether a judgment of affirmance would be awarded or an order of dismissal be allowed involved nothing whatever of substance, but mere form of statement, as the two were the equivalent one of the other, it was observed that the better practice, where the question was not inherently Federal, was to adopt the form of allowing a motion to dismiss, the court, on the subject of the inherently Federal question, referring to *Swafford* v. *Templeton*, 185 U. S. 487, 493.

The enquiry then narrows itself to this: Does the power to award the damages for delay which the statute confers in cases of affirmance give the authority to exert the power where, in form, there is no judgment of affirmance but only an order of dismissal? To say that the duty to impose the statutory damage in such a case did not exist would require us to hold that things which were one and the same must be held to be different, and that the statute did not extend to and include that which in substance it embraced, because, by adhering blindly to mere form of words, the statute might be treated as not extending to an authority embraced within its spirit and purpose. No more cogent demonstration of the truth of this view could be given than by pointing out that if the proposition were not true it would follow that in no case could this court, without operating injustice, grant a motion to dismiss because of the frivolous and unsubstantial nature of the alleged Federal ground. This would be the case since if greater right would be conferred by affirming on such ground, the duty would arise to follow that practice instead of the practice of dismissing. Indeed, the subject is further aptly illustrated by directing attention to the fact that it is not questioned that the power here obtains

to direct the imposition of the penalty if the result of our conclusion that the Federal ground was frivolous be followed by an affirmance instead of an order of dismissal. Because of the absolute coincidence between a dismissal on account of the frivolous and unsubstantial character of the Federal question relied upon and an affirmance upon the same ground, we are of opinion that the statutory authority to impose the penalty obtains in either case. In stating the reasoning which has led us to this conclusion we have not been unmindful of, although we have not reviewed, a line of cases concerning the nature and extent of the power to impose costs in the case of a dismissal for want of jurisdiction. See *Citizens' Bank* v. *Cannon*, 164 U. S. 319, 323, and cases cited. We have not deemed it necessary to do so because nothing in the reasoning of those cases tends to affect the substantial identity which exists between a decree of dismissal and one of affirmance where the ground upon which one is placed equally justifies either form of decree.

In consequence of the conclusion which we have reached as above stated we direct the imposition of a penalty, in addition to interest, of five per cent. on the amount of the judgment recovered below and the taxation of costs as upon an affirmance.

*Writ of error dismissed with damages, etc.*